Supreme Court, U.S.
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In The

Supreme Court of the United States

RTM MEDIA, L.L.C.,

Petitioner,

v.

CITY OF HOUSTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit ruled that the City of Houston's selective ban on offsite commercial signs did not violate the First Amendment. In doing so, the court added to a circuit conflict on the effect of the plurality decision in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), regarding First Amendment restraints on billboard regulations.

The questions presented are:

1. Does a ban on offsite commercial signs violate the First Amendment where a city distinguishes between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns?

2. Should this Court resolve the circuit conflict on the effect of the plurality decision in *Metromedia* regarding First Amendment restraints on billboard regulation, to reconcile the limited holding of *Metromedia* with this Court's more recent decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), and to restore the proper boundaries on the regulation of commercial speech to accord with this Court's more recent and evolving commercial speech jurisprudence?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner RTM Media, L.L.C. states that it is a privately held Texas limited liability company, currently in receivership proceedings pending in the United States District Court for the Southern District of Texas (Houston Division) under Civil Action No. 09-1098. Petitioner's parent company is Bluewater Outdoor, LLC, also a Texas limited liability company. No publicly held corporation owns ten percent (10%) or more of Petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	3
PERTINENT MUNICIPAL CODE PROVISIONS	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
1. This Court Should Resolve the Circuit Conflict on the Effect of *Metromedia* Regarding First Amendment Restraints on Municipal Regulation of Offsite Commercial Signs	10
2. The City of Houston's Selective and Underinclusive Ban on Offsite Commercial Signs Violates the First Amendment	19
CONCLUSION	32

TABLE OF CONTENTS – Continued

Page

APPENDIX

Court of Appeals Opinion (September 28, 2009) ..... App. 1

District Court Final Memorandum Opinion (September 29, 2008) ..... App. 20

District Court Opinion Granting Temporary Injunction (September 26, 2007) ..... App. 50

Court of Appeals Order Denying Rehearing (October 26, 2009) ..... App. 71

TABLE OF AUTHORITIES

Page

CASES:

Ackerley Communications of Mass., Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996).....31

Ackerley Communications of Mass., Inc. v. City of Somerville, 878 F.2d 513 (1st Cir. 1989).....28, 30

Action Outdoor Adver. JV, LLC v. Shalimar, 377 F. Supp. 2d 1178 (N.D. Fla. 2005).....15

Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006) 17

Advantage Media, LLC v. City of Hopkins, 379 F. Supp. 2d 1030 (D. Minn. 2005).....23

Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).....11

Central Hudson Gas and Electric Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).....10, 11, 25

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).....*passim*

Dimmitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993).....26

Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464 (6th Cir. 1991), *aff'd*, 507 U.S. 410 (1993).....15

Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999) 18

TABLE OF AUTHORITIES – Continued

Page

Horizon Outdoor, LLC v. City of Industry, 228 F. Supp. 2d 1113 (C.D. Cal. 2002) 24

Houston Balloons & Promotions, LLC v. City of Houston, No. H-06-3961, 2009 WL 1811224 (S.D. Tex. June 24, 2009) 27

Kitsap County v. Mattress Outlet, 104 P.3d 1280 (Wash. 2005) 25

Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999) 15

Major Media of the S.E., Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986) 16

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) ..... *passim*

National Adver. Co. v. City and County of Denver, 912 F.2d 405 (10th Cir. 1990) 17

North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000) 25

Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895 (9th Cir. 2007) 16, 27

Outdoor Sys., Inc. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999) 27

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 28

Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994) 15, 17

TABLE OF AUTHORITIES – Continued

Page

Riel v. City of Bradford, 485 F.3d 736 (3d Cir. 2007) 15

Solantic LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) 15, 26

Southlake Property Assoc., Ltd. v. City of Morrow, Ga., 112 F.3d 1114 (11th Cir. 1997) 17, 18

STATUTES:

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1291 9

42 U.S.C. § 1983 7

43 TEX. ADMIN. CODE § 21.151(a) 6

City of Houston Sign Code, HOUSTON, TEX. BUILDING CODE ch. 46 (1980), as amended ..... *passim*

TEX. TRANS. CODE § 391.068 5

TEX. LOC. GOV'T CODE § 42.021 5

INTRODUCTION

This is yet another of the oft-recurring cases testing whether, and to what extent, the First Amendment limits the authority of local governments to regulate billboards in the name of safety and esthetics. Petitioner is aware of two other cases filed in this Court in the past six months that have raised similar issues: *Metro Lights, L.L.C. v. City of Los Angeles,* Case No. 09-259 (*cert. denied*, Dec. 14, 2009), and *Maldonado v. Iwasaki,* Case No. 09-359 (*cert. denied*, Jan. 19, 2010).

Billboard cases have recurred with regrettable frequency ever since this Court's fractured decision in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981). In *Metromedia,* a plurality of four Justices found the San Diego billboard ordinance unconstitutional under First Amendment analysis, but sharp divisions were exposed between the plurality and the four additional decisions, either concurring, dissenting or dissenting in part. Justice Rehnquist called the result "judicial clangor," concluding, "it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569-70.

Justice Rehnquist's prediction has proven to be strikingly prophetic. Courts, local governments, property owners and advertisers have struggled for almost 30 years to interpret and understand First Amendment constraints on billboard regulation. By

and large, they remain in the dark. The City of Houston is not alone in its efforts to enforce a Sign Code that impermissibly discriminates against some identically situated billboards based solely on the content of the message. This regulatory framework runs afoul of this Court's more recent holding in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), since the signs that are banned raise the same concerns for safety and esthetics as the signs that are freely allowed. When it comes to striking the proper balance between First Amendment protections for free speech on the one hand, and permissible regulations to advance traffic safety and esthetics on the other, the law remains frustratingly contradictory, confusing and opaque.

Petitioner respectfully asks this Court to revisit *Metromedia* to bring some much-needed certainty and clarity to this important area of First Amendment law, to reconcile the seeming contradictions between *Metromedia* and *Discovery Network*, and to restore the proper boundaries on regulation of commercial speech by local governments.

OPINIONS BELOW

The Fifth Circuit's decision is reported at 584 F.3d 220 and reprinted in the Appendix ("App.") at App. 1. The District Court's opinion is reported at 578 F. Supp. 2d 875 and reprinted at App. 20.

JURISDICTION

The Fifth Circuit rendered its decision on September 28, 2009, App. 1, and denied a timely Petition for Panel Rehearing on October 26, 2009, App. 71. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT MUNICIPAL CODE PROVISIONS

Section 4619 of Houston's Sign Code[1] provides in pertinent part:

> **(b) Declared Nonconformity.** All off-premise signs within the sign code application area are hereby declared to be nonconforming and unauthorized. . . .
>
> **(c) Exclusion.** The provisions of this section shall not be construed to require the removal of a structure that is used exclusively and at all times . . . for messages that do not constitute advertising, including, but not limited to, political messages, religious or church related messages, public service, governmental and ideological messages and other copy of a nature that is not commercial advertising because such a

[1] The Sign Code provisions cited are those in effect at the time this lawsuit was filed. The Sign Code has since been amended several times, but none of the subsequent amendments bear on the issues in this case. City of Houston Sign Code, HOUSTON, TEX. BUILDING CODE ch. 46 (1980), as amended.

> structure is not a "sign" (either on-premise or off-premise), as that term is defined, for purposes of this chapter and is not subject to regulation under this chapter. . . .

Section 4602 of Houston's Sign Code provides in pertinent part:

> **SIGN** shall mean any outdoor display, design, pictorial or other representation that shall be so constructed, placed, attached, painted, erected, fastened, or manufactured in any manner whatsoever so that the same shall be used for advertising. . . .

Finally, Section 4603(a) of Houston's Sign Code provides in pertinent part:

> **ON-PREMISE SIGN** shall mean any sign identifying or advertising the business, person, activity, goods, products, or services primarily sold or offered for sale on the premises where the sign is installed and maintained when such premises is used for business purposes.
>
> **OFF-PREMISE SIGN** shall mean any sign that advertises a business, person, activity, goods, products, or services not usually located on the premises where the sign is installed and maintained, or that directs persons to any location not on the premises.

STATEMENT OF THE CASE

A. Factual Background.

Petitioner RTM Media, L.L.C. owns 59 billboards along regulated highways in the extraterritorial jurisdiction ("ETJ") of the City of Houston.[2] RTM has a valid permit from the State of Texas Department of Transportation ("TxDOT") for each sign. To obtain state permits, RTM was required to submit detailed plans and drawings to TxDOT, showing that the sign met the size, spacing and lighting criteria established by state regulations.

When RTM's billboards were erected, the Texas Transportation Code required state-issued permits for signs along regulated highways, but contained a permissive exception allowing cities to issue their own permits "in lieu of the permit required by this subchapter," provided (1) that the city's requirements were at least as stringent as those of the state, and (2) that the sign was "within that [city's] jurisdiction." TEX. TRANS. CODE § 391.068(c) (effective September 1, 1995). State law further provided that certification by a city "in lieu of" the TxDOT permits "shall not apply within the extraterritorial jurisdiction of a political

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[2] "The extraterritorial jurisdiction of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located" within a certain mile range of the city limits based on the number of inhabitants living in the municipality. TEX. LOC. GOV'T CODE § 42.021. In the City of Houston, the extraterritorial jurisdiction extends five miles from Houston's city limits. *See id.* at § 42.021(5).

subdivision." 43 TEX. ADMIN. CODE § 21.151(a). Both RTM and TxDOT read these provisions to require only state-issued permits in the ETJ, although the City disagreed and continued to issue tickets against RTM's signs. After all of RTM's signs were erected, and in the months before this litigation began, the Texas Legislature amended the state Transportation Code to provide that an advertiser needed *both* a city permit and a TxDOT permit in municipalities "with a population of more than 1.9 million" – which, in Texas, only describes the City of Houston. TEX. TRANS. CODE § 391.068 (eff. September 1, 2007). The 2007 amendment validates RTM's claim that only a state-issued permit was required before the statute was changed, and this was the basis for RTM's due process claim in the proceedings below.[3]

The City of Houston enacted its Sign Code in 1980 to regulate the size, spacing and location of outdoor signs, to provide for the gradual removal of "non-conforming" signs and to generally prohibit the construction of any new "off-premise" (or offsite) signs. The Sign Code defines regulated "signs" as "any outdoor display, design, pictorial or other representation that . . . shall be used for advertising." Sign Code Section 4602, App. 22. The code excludes from

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[3] After ruling in the City's favor on the First Amendment challenge, the Fifth Circuit affirmed the district court's decision to abstain from reaching RTM's due process claim. App. 16-19. RTM does not seek review of the abstention holding in this Court.

the definition of "sign" any structure "that is used exclusively and at all times . . . for messages that do not constitute advertising, including, but not limited to, political messages, religious or church related messages, public service, governmental and ideological messages or other copy of a nature that is not commercial advertising . . . ". *Id.* at § 4619(c), App. 23. The ordinance also generally permits, with some restrictions, on-premise signs that carry a commercial message. Thus, Houston's Sign Code distinguishes between signs that are used for advertising, or commercial speech, and signs that are used for "political messages, religious or church related messages" and the like, or noncommercial speech. Signs with noncommercial messages can proliferate, either on-premise or off-premise, while signs with commercial messages are regulated (on-premise) or prohibited all together (off-premise).

It bears emphasis that a sign is only deemed "noncommercial" if it "is used exclusively and at all times" for messages that do not constitute advertising. *Id.* at § 4619(c), App. 23. Thus, an off-premise sign that has advertised a church for five years, but once carried an advertisement for a restaurant for one day, is not exempt and must be removed.

The City issued numerous citations to RTM claiming its signs violated the Sign Code, and in July 2007 the City filed suit against RTM in state district court in Houston seeking a declaration that RTM's signs were noncompliant. On August 29, 2007, the Houston City Attorney sent a letter to all of RTM's

customers who advertised on its signs, threatening to fine each advertiser $500 per day unless they pulled all advertising from RTM's billboards. App. 27-28. The City claimed that RTM's advertisers were also in violation of the Sign Code, because the individual advertiser had also failed to obtain a city permit to "use" the sign.

B. Procedural History.

On September 12, 2007, RTM filed this lawsuit against the City of Houston under 42 U.S.C. § 1983, seeking a temporary injunction to stop the City's enforcement actions against its advertisers. RTM asserted that the Sign Code violated the First Amendment, and also claimed that the City's enforcement actions violated due process, since the signs all had valid state permits issued by TxDOT, and the statutory provisions in effect at the time precluded municipal regulation in the ETJ.

On September 26, 2007, in response to RTM's application, the District Court granted a preliminary injunction against enforcement of the Sign Code. App. 50. The District Court held that RTM had standing to challenge the Sign Code, and that abstention was inappropriate given the First Amendment values asserted. App. 56-60. Relying chiefly on this Court's opinion in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the District Court held that RTM had shown a substantial likelihood of success on the merits, because the Sign Code was not narrowly

drawn to achieve the stated objectives of promoting safety and esthetics. "Noncommercial billboards are visual blights, traffic dangers and undesirable for property values for the same reason as commercial billboards." App. 67. The City was free to impose reasonable regulations unrelated to the content of the speech, "but not by regulating and prohibiting only off-premises commercial billboards while allowing noncommercial billboards to proliferate freely." *Id.*

After discovery, both Houston and RTM moved for summary judgment. On September 29, 2008, the District Court issued its Final Memorandum and Order, and reversed course by granting the City's motion for summary judgment while denying RTM's motion. App. 20. The Final Judgment held that *Discovery Network* was distinguishable, and that this Court's earlier opinion in *Metromedia* should instead be applied to the case. App. 36-37. The court accordingly overruled RTM's First Amendment challenge, and having done so, again reversed course and abstained from reaching RTM's due process challenge. App. 43-47.

RTM appealed to the Fifth Circuit pursuant to 28 U.S.C. § 1291. On September 28, 2009, the Fifth Circuit affirmed. App. 1. The Fifth Circuit acknowledged that resolution of the claims was governed by this Court's opinions in *Metromedia* and *Discovery Network*, but determined that *Discovery Network* was distinguishable for three reasons. First, the ordinance in *Discovery Network* was an older regulation designed to limit handbills, and only later applied to

newsracks, while Houston's Sign Code was specifically crafted to address billboards. Second, the Cincinnati ordinance in *Discovery Network* failed to regulate the physical characters or number of newsracks, while Houston's Sign Code clearly regulated the number, size, lighting and location of billboards. Finally, the Cincinnati ordinance removing commercial newsracks only affected a small number of the total newsracks in question, while Houston's Sign Code, by targeting only commercial offsite signs, had made a more substantial reduction in the total number of billboards.

RTM timely filed a Petition for Panel Rehearing, which the Fifth Circuit denied on October 26, 2009. App. 71. This petition followed.

REASONS FOR GRANTING THE WRIT

1. This Court Should Resolve the Circuit Conflict on the Effect of *Metromedia* Regarding First Amendment Restraints on Municipal Regulation of Offsite Commercial Signs.

It is beyond dispute that the First Amendment protects commercial speech from unrestricted governmental regulation. *Central Hudson Gas and Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). In *Central Hudson*, this Court established a well-known four part test for analyzing governmental restrictions on commercial speech: (1) commercial speech is entitled to some protection if it concerns

lawful activity and is not misleading; (2) a restriction on otherwise protected commercial speech is valid only if it seeks to advance a substantial government interest; (3) the restriction must directly advance that interest; and (4) the restriction must reach no further than necessary to accomplish the objective. *Id.* at 563-66. The sign code regulations do not have to be the least restrictive means available, but there must be a "reasonable fit" between the City's interest in esthetics and traffic safety and the means chosen to accomplish those goals. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

As in most sign code cases, the first two elements of *Central Hudson* are not in dispute. The City does not contend that RTM's billboards contain unlawful or misleading speech, and RTM agrees that, under applicable case law, the City's stated interest in esthetics and traffic safety are substantial (but not compelling) government goals. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). This appeal addresses the third and fourth elements of *Central Hudson*: whether Houston's Sign Code directly advances the City's interest in esthetics and traffic safety, and if it does, whether it reaches no further than necessary.

In *Metromedia*, this Court addressed the constitutionality of a San Diego billboard ordinance that generally banned offsite commercial and noncommercial signs throughout the city, while allowing onsite commercial signs, and also allowing certain content-specific noncommercial signs such as

temporary political signs. In a fractured plurality decision, this Court struck the San Diego ordinance as unconstitutional under the First Amendment, although the plurality, concurring and dissenting opinions disagreed as to the grounds. 453 U.S. 490. The plurality opinion (White, J., joined by Stuart, Marshall and Powell, J.J.) held that the ordinance's distinction between onsite and offsite commercial advertising was valid, but the ordinance's treatment of noncommercial signs was unconstitutional in two respects. *Id.* at 512-14, 521. First, the ordinance could not favor some noncommercial messages (*e.g.*, temporary political signs) over others; the First Amendment prohibited the City from regulating noncommercial messages based on content. *Id.* at 514. Second, and more relevant here, the ordinance was unconstitutional in allowing onsite commercial advertising, while generally prohibiting onsite noncommercial signs that posed the same concerns for safety and esthetics: "The use of onsite billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited." *Id.* at 513.

Justice Brennan, joined by Justice Blackman, concurred in the judgment invalidating the ordinance, but would have further held that the ordinance was invalid as applied both to commercial and to noncommercial signs. *Id.* at 521-40. Justice Stevens, Chief Justice Burger, and Justice Rehnquist each separately dissented on the ground that the

ordinance was valid as applied both to commercial and noncommercial signs. *Id.* at 540-55 (Stevens, J., dissenting in part); *id.* at 555-69 (Burger, C.J., dissenting); *id.* at 569-70 (Rehnquist, J., dissenting). Justice Rehnquist concluded in his dissent that "[i]n a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569 (Rehnquist, J., dissenting).

Twelve years after *Metromedia*, this Court revisited the issue of a municipal ordinance discriminating between commercial and noncommercial speech in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). In *Discovery Network*, Cincinnati applied a local ordinance so as to ban newsracks with commercial handbills, while allowing newsracks with noncommercial handbills. This Court struck Cincinnati's ordinance as unconstitutional, because the distinction between commercial and noncommercial newsracks bore no relation to the stated interest in esthetics:

> The city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing "newspapers" or "commercial handbills," is equally unattractive.

Id. at 425. In defending the ordinance, Cincinnati relied heavily on the earlier decision in *Metromedia*, just as Houston does here. The Court dealt directly with *Metromedia* in terms also highly pertinent to this case:

> *Metromedia* . . . upon which the city heavily relies, is not to the contrary. . . . THE CHIEF JUSTICE is correct that seven Justices in the *Metromedia* case were of the view that San Diego could completely ban offsite commercial billboards for reasons unrelated to the content of those billboards. [citation omitted] Those seven Justices did not say, however, that San Diego could *distinguish* between commercial and noncommercial offsite billboards that caused the same esthetic and safety concerns. That question was not presented in *Metromedia*. . . .

Id. at 425 n.20 (emphasis in original). The Court concluded that Cincinnati's arbitrary distinction between commercial and noncommercial newsracks "has absolutely no bearing on the interests it has asserted," and accordingly, the City "has not established the 'fit' between its goals and its chosen means" as required in *Central Hudson* and *Fox*. *Id.* at 428.

In the 28 years since it was written, the *Metromedia* opinion has been assailed as a "fractured" and "badly splintered" precedent, from which the circuit courts are "unable to glean any governing standard" because the plurality and concurring opinions "took such markedly different approaches to the San Diego

ordinance that there is no common denominator between them." *See, e.g., Riel v. City of Bradford,* 485 F.3d 736, 745 (3d Cir. 2007); *Rappa v. New Castle County,* 18 F.3d 1043, 1057-58 (3d Cir. 1994); *Action Outdoor Adver. JV, LLC v. Shalimar,* 377 F. Supp. 2d 1178, 1188 (N.D. Fla. 2005) ("[T]he Court must acknowledge the lack of clear guidance in this area of First Amendment jurisprudence.").

The Third, Sixth and Eleventh Circuits have at various times concluded that *Metromedia* cannot serve as binding precedent because it did not yield a majority opinion or establish any clear legal principles, and the Seventh Circuit has held, in at least one instance, that the impact of *Metromedia* is clouded by footnote 20 in *Discovery Network*. *See, e.g., Solantic LLC v. City of Neptune Beach,* 410 F.3d 1250, 1261 (11th Cir. 2005) ("Because the *Metromedia* plurality's constitutional rationale did not garner the support of a majority, it has no binding application. . . ."); *Rappa v. New Castle County*, 18 F.3d 1043, 1060 (3d Cir. 1994) ("Since the opinions in *Metromedia* share no common denominator, they do not establish a governing standard for future cases."); *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991) (declining to interpret *Metromedia* as establishing binding law with respect to restrictions on commercial speech), *aff'd,* 507 U.S. 410 (1993).

In *Lavey v. City of Two Rivers,* 171 F.3d 1110, 1116 (7th Cir. 1999), the Seventh Circuit upheld a municipal ordinance in the face of an underinclusivity challenge, holding that the issue had not been

adequately presented to the District Court, and that the ordinance in question did not clearly distinguish between commercial and noncommercial offsite signs. However, the Court recognized that the precedential value of *Metromedia* was thrown into considerable doubt by this Court's subsequent holding in *Discovery Network:*

> In footnote 26 [of *Metromedia*], the Supreme Court instructed the California courts that they could uphold the ordinance by construing it to apply only to commercial signs. . . . However, this footnote is not dispositive in this case in light of the later *Discovery Network* footnote [20] implying that such an ordinance is underinclusive unless sufficient evidence of a fit between the distinction and the city's safety and aesthetics goals exists.

Id. at 1115 n.16.

In contrast to the results in these courts, the Fourth, Eighth, Ninth and Tenth Circuits have essentially followed *Metromedia* as a binding precedent that gives municipalities very broad latitude in regulating billboards. *See, e.g., Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 905 (9th Cir. 2007) ("*Metromedia* allows a city to completely ban off-site commercial billboards. . . ."); *Major Media of the S.E., Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) ("The Supreme Court . . . determined in *Metromedia* that a city may justifiably prohibit all off-premises signs or billboards for aesthetic and

safety reasons. . . .") (citation omitted); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006) (relying on *Metromedia* to uphold broad restrictions on all offsite commercial signs); *National Adver. Co. v. City and County of Denver*, 912 F.2d 405, 408-10 (10th Cir. 1990) (applying *Metromedia* to reject an underinclusivity challenge to commercial billboard regulations).

Aside from these two broadly divergent views of *Metromedia's* precedential value, other courts have occasionally struck out on their own, either applying a new test or adopting a unique and independent analysis. In *Rappa v. New Castle County*, 18 F.3d 1043, 1062 (3d Cir. 1994), the Third Circuit, after concluding that *Metromedia* offered no guidance, adopted its own "context specific" test. When there is a "significant relationship between the content of particular speech and a specific location or its use," the Court concluded that a state can exempt a sign from regulation "so long as the state did not make the distinction in an attempt to censor viewpoints or to control what issues are appropriate for public debate." *Id.* at 1065. Presumably, the onsite/offsite distinction validated in *Metromedia* would constitute one context in which selective exemption would be allowed, although other contexts may also pertain on different facts.

Occasionally the lack of clear precedent has led some courts to adopt reasoning that is nothing short of bizarre. In *Southlake Property Assoc., Ltd. v. City of Morrow, Ga.*, 112 F.3d 1114 (11th Cir. 1997), the

Eleventh Circuit upheld an ordinance despite a general prohibition on all offsite signs. The plaintiff argued that a ban on all offsite signs was unconstitutional because it unduly burdened noncommercial speech. The Court sidestepped the potential impact on noncommercial speech with semantic legerdemain, reasoning that intangible ideas have no physical location, and accordingly, all noncommercial speech is by definition "onsite": "a sign bearing a noncommercial message is onsite wherever the speaker places it." *Id.* at 1118. Thus, an ordinance that by its terms bans both commercial and noncommercial offsite signs in fact allows all offsite noncommercial signs; as soon as the sign message became "noncommercial," the sign itself morphs into an "onsite" sign by definition, which removes it from the regulatory proscription.

Any body of case law that produces this kind of reasoning is pathologically in need of repair. When an ordinance eliminates some signs in the name of esthetics and safety, while exempting otherwise identical signs based on nothing more than the content of the message, it should be clear that First Amendment interests are implicated. Plainly, this Court has continued to sustain underinclusivity challenges in the commercial speech context. *Discovery Network* established that a city ordinance banning commercial newsracks, while allowing identical noncommercial newsracks, did not directly and materially advance the city's interest in esthetics and safety. Likewise, in *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 190 (1999),

this Court held that a ban on casino advertising was unconstitutional as applied in Louisiana, where casino gambling was legal, in part because existing federal law exempted advertising for casinos located on Indian tribal lands under state compacts. In sum, this Court's evolving jurisprudence since *Metromedia* demonstrates the viability of underinclusivity analysis in the context of a First Amendment challenge to regulation of commercial speech.

This Court can and should revisit *Metromedia* to resolve the deep split among the Circuit Courts, and to give much-needed guidance as to the precedential value of the plurality and dissenting opinions in that case.

2. The City of Houston's Selective and Underinclusive Ban on Offsite Commercial Signs Violates the First Amendment.

The main constitutional flaw in Houston's Sign Code is that its distinction between commercial and noncommercial offsite signs bears no relation whatsoever to esthetics or traffic safety. An offsite sign promoting a church may be just as large, and obstruct the same view, as an offsite sign promoting a restaurant.

In this respect, the principles at play in this case are indistinguishable from those laid down in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Cincinnati's selective ban on commercial newsracks, while allowing identical noncommercial

newsracks, was not a "reasonable fit" with the stated goal of esthetics and safety: "Each newsrack, whether containing 'newspapers' or 'commercial handbills,' is equally unattractive." *Id.* at 425. Cincinnati's ordinance could not be defended as a reasonable time, place and manner restriction. *Id.* at 430. It did not simply limit the number of newsracks; "it has limited (to zero) the number of newsracks *distributing commercial publications*." *Id.* at 429 (emphasis in original). Since Cincinnati's arbitrary distinction between commercial and noncommercial newsracks "has absolutely no bearing on the interests it has asserted," the city had not established the reasonable fit between the stated goals and the chosen means, as required by *Central Hudson* and *Fox*. *Id.* at 428.

The same analysis dooms Houston's Sign Code. Each offsite sign is equally unattractive and blocks the same view, regardless of whether the sign face contains commercial or noncommercial messages. Houston's stated concern is with the aggregate number of offsite signs, but as this Court has observed, on this score all signs are "equally at fault," regardless of the content of their message. *Discovery Network*, 507 U.S. at 426. Houston's dim view of the value of commercial speech is an unconstitutional pretext for its selective and categorical ban on commercial offsite signs. The Constitution does not allow a city to "limit (to zero)" the number of offsite signs containing only commercial messages. *Id.* at 429.

Discovery Network clearly holds that a different result is not mandated by the Court's earlier opinion

in *Metromedia*. The plurality and concurring opinions in *Metromedia* "did not say . . . that San Diego could *distinguish* between commercial and noncommercial offsite billboards that caused the same esthetic and safety concerns." *Id.* at 425 n.20 (emphasis in original). Houston's Sign Code falls directly in line with the salient flaw identified in *Discovery Network* footnote 20: it distinguishes between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns. Offsite noncommercial signs are freely allowed, while otherwise identical signs with commercial messages are totally banned.

The compatibility of *Metromedia* and *Discovery Network*, and the infirmity in Houston's Sign Code, may be graphically represented as follows. The San Diego ordinance in *Metromedia* bans all offsite signs while allowing only onsite commercial signs, resulting in a regulatory scheme like this:

Metromedia

	Commercial Speech	**Noncommercial Speech**
Onsite Sign	allowed	banned
Offsite Sign	banned	banned

This Court held that the distinction between onsite and offsite commercial signs (green vertical oval outline) was permissible, but the discrimination between commercial and noncommercial speech on the same

platform (onsite signs – red horizontal oval outline) was unconstitutional. Similarly, in *Discovery Network,* Cincinnati's ordinance could not discriminate against commercial speech within the same communicative platform (newsracks):

Discovery Network

	Commercial Speech	**Noncommercial Speech**
Any newsrack	banned	allowed

In the present case, Houston's Sign Code suffers from precisely the same type of content-based discrimination within the same communication platform (offsite signs) that was held unconstitutional in both *Metromedia* and *Discovery Network*. Houston's Sign Code scheme looks like this:

Houston Sign Code

	Commercial Speech	**Noncommercial Speech**
Onsite Sign	allowed	allowed
Offsite Sign	banned	allowed

The constitutional flaw in this Sign Code arises in its discriminatory treatment (red horizontal oval outline) between commercial and noncommercial speech within the same platform: offsite signs. *Discovery Network* teaches that the City cannot discriminate against commercial speech in newsrack

platforms. *Metromedia* teaches that the city cannot discriminate against noncommercial speech in onsite sign platforms. Both precedents compel the conclusion that Houston cannot discriminate against commercial speech in the same physical medium, which in Houston's case happens to be offsite signs.

Many courts have held local ordinances unconstitutional on similar reasoning, either because they discriminate against commercial speech while allowing identical platforms of noncommercial speech, or more broadly, because they contain other content-based distinctions between commercial and noncommercial speech which bear no relation to the stated goals of esthetics and safety. In *Advantage Media, LLC v. City of Hopkins*, 379 F. Supp. 2d 1030 (D. Minn. 2005), the court held the city's sign code to be unconstitutional since it contained a number of content-based distinctions, some of which discriminated against commercial speech. As here, offsite commercial signs were generally banned, while specific classes of noncommercial signs (governmental, political and identification) were allowed. The court found this type of content-based discrimination to be unconstitutional, applying the *Discovery Network* rationale to the city's sign code:

> Just as the ordinance in *City of Cincinnati* failed to connect its interests with the distinctions between commercial and noncommercial speech, the City's legitimate interests in orderly development, health, safety, and morals bear no relationship to the

> Ordinance's distinguishing between political signs, real estate signs, commercial signs, and other content-based distinctions. . . . [The] differing regulations for political, real estate, and commercial signs are not narrowly tailored. . . .
>
> Because the determination of a sign's duration and size are dependent upon the content of the speech, and because those factors are not related to the City's proffered interests in safety and aesthetics, the Ordinance is not narrowly tailored to further those interests.

Id. at 1044. In *Horizon Outdoor, LLC v. City of Industry,* 228 F. Supp. 2d 1113 (C.D. Cal. 2002), the city's sign code specifically targeted and prohibited offsite commercial signs, just as Houston's code does here. The court found the city ordinance to be unconstitutional, since the targeted ban on commercial offsite signs was not a reasonable fit with the stated interests in esthetics and traffic safety:

> The Court finds that the Sign Ordinance restricts far more speech than necessary. In the context of off-site advertising displays alone, the Sign Ordinance bans all new signs regardless of their size, their location, or the number of other signs in the vicinity. That is, the Sign Ordinance bans all off-site signs regardless of whether a new sign would cause visual blight or create a safety hazard.

Id. at 1127. The ordinance thus bore no relation to the government's stated objective, since onsite signs

(or offsite noncommercial signs) could create just as much blight or hazard, yet the ordinance only banned offsite commercial signage.

In *Kitsap County v. Mattress Outlet,* 104 P.3d 1280 (Wash. 2005), the Supreme Court of Washington held that the challenged sign ordinance unconstitutionally restricted commercial speech. As here, the Kitsap County ordinance prohibited offsite commercial signs, but allowed exemptions for a number of noncommercial signs. The signs at issue were large raincoats that were reinforced to make them rigid and flat, displaying in large letters an advertising slogan for petitioner's mattress store. Applying the *Discovery Network* rationale, the Court found the ordinance unconstitutional, since "the Kitsap County ordinance distinguishes between commercial and noncommercial speech, although that distinction does not bear any relationship to the county's interests in aesthetics and safety." 104 P.3d at 1286. The Court also found that Kitsap County "failed to affirmatively establish that its restriction materially and directly advances its interests in aesthetics and safety," since the ordinance was directed solely to commercial speech while exempting other forms of speech. *Id.* at 1285. The ordinance thus failed both the third and fourth prongs of the *Central Hudson* test: "As it is, the offsite advertising ban burdens substantially more speech than is necessary to further the government's interests." *Id.* at 1286.

In *North Olmsted Chamber of Commerce v. City of North Olmsted,* 86 F. Supp. 2d 755 (N.D. Ohio

2000), the court found that North Olmsted's sign code discriminated against commercial speech in a number of ways. Noncommercial artistic murals were allowed, while graphic displays with commercial messages (such as corporate logos) were banned. Certain classes of directional signs, government signs and political signs were allowed, while signs with commercial messages were targeted for removal. The court found this discrimination against commercial speech to be unconstitutional:

> It is also not evident why a mural may contain content that may be very distracting (such as sexually explicit but not obscene art) or aesthetically displeasing, but may not contain words, corporate products, or corporate images. Surely a mural containing the "golden arches" of McDonalds is not more distracting than Botticelli's "Venus" . . .
>
> . . .
>
> These commercial speech elements are protected under the First Amendment. There is no evidence that these signs might be less safe or less aesthetically pleasing than other signs in the City's business districts.

Id. at 768, 771. *See also Dimmitt v. City of Clearwater,* 985 F.2d 1565 (11th Cir. 1993) (city ordinance that allowed government flags while banning commercial logo flags operates unconstitutionally, both in exempting government flags and in denying such an exemption to other flags); *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250 (11th Cir. 2005) (same);

Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895 (9th Cir. 2007) (reversing district court's dismissal of sign company's challenge to sign code on First Amendment grounds; distinctions between commercial and noncommercial text on sign may bear no relation to esthetics or safety); *Outdoor Sys., Inc. v. City of Merriam*, 67 F. Supp. 2d 1258 (D. Kan. 1999) (ordinance impermissibly discriminated between commercial and noncommercial messages in onsite signage; there is no valid esthetic or safety difference between a "Vote for Joe" sign and a "Joe's Pizza" sign).

In the weeks just before oral argument in the Fifth Circuit below, another federal district court sustained a different constitutional challenge to Houston's outdoor advertising ordinances based on substantially the same reasoning. *Houston Balloons & Promotions, LLC v. City of Houston,* No. H-06-3961, 2009 WL 1811224 (S.D. Tex. June 24, 2009). In *Houston Balloons*, the plaintiff was a marketing company that leased large inflatable balloons to promote a customer's business. The balloons were regulated under a separate ordinance that pertained to requirements for "attention getting devices" or "AGDs." AGDs with generic messages (such as "grand opening" or "sale") were allowed with certain restrictions. AGDs with non-generic messages that advertised a particular business ("Joe's Pizza") were treated as "signs" under Houston's Sign Code, and thus were generally banned. Using much the same reasoning that RTM advances here (although the plaintiff framed his complaint as an equal protection

challenge rather than a First Amendment claim[4]), the District Court found that Houston's regulation of AGDs was unconstitutional:

> Here, the City prohibited AGDs with *non-generic* messages, while allowing *generic* messages or no messages on identical AGDs. . . . The City stated that its goals in regulating AGDs were traffic safety and visual aesthetics. However, the City has provided no evidence demonstrating that its classification between AGDs with *non-generic* messages and AGDs with *generic* messages promoted safety or aesthetics. . . . [T]he Court finds that there is no rational relationship between the regulations at issue and the City's stated goals.

Id. at *6.

Justice Brennan, concurring with the result in *Metromedia*, illustrated another reason why regulatory schemes like Houston's Sign Code are unconstitutional. Justice Brennan could not accept the plurality view "that an ordinance totally banning commercial billboards but allowing noncommercial

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[4] The analysis under a First Amendment or Equal Protection claim is similar. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (recognizing the intersection between First Amendment interests and Equal Protection claims where an ordinance treats some kind of picketing differently from others); *Ackerley Communications of Mass., Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989) (noting that either analysis would lead to the same result).

billboards would be constitutional," since such a content-based distinction effectively gave city officials the right of censorship. *Metromedia,* 453 U.S. at 536. Whether a given sign was allowed or banned hinged upon the city's discretion in distinguishing commercial messages from noncommercial messages – a distinction that Justice Brennan found to be "anything but clear." *Id.* Such a regulatory scheme "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech." *Id.* at 536-37. Justice Brennan used several examples to illustrate the constitutional problems this presented. A sign encouraging viewers to be patriotic and "buy American" cars, rather than Japanese, may be noncommercial if sponsored by the United Automobile Workers. Does the same sign, with the same message, become "commercial" if it is paid for by General Motors? Similarly a sign applauding a local sports franchise may be noncommercial if sponsored by fans, but does it become "commercial" if it is instead sponsored by the franchise owner? In Justice Brennan's view, giving the government discretion to censor messages by characterizing them as "commercial" or "noncommercial" ultimately will encourage advertisers to script their message so as to "place themselves in the safe haven of noncommercial speech," which makes the regulatory process both more difficult and more intrusive upon legitimate noncommercial expression. *Id.* at 540.

Finally, in addition to its underinclusivity and its promotion of government censorship based solely on

the content of protected speech, Houston's Sign Code poses a third and related constitutional flaw. To be exempt from regulation, it is not enough that an offsite sign currently displays a noncommercial message. To be excluded from the Sign Code's general ban, a petitioner must establish that the sign has been used "exclusively and at all times" for noncommercial messages. Sign Code Section 4619(c), *supra* at 2. If an offsite sign currently bears a noncommercial message promoting a church, for example, but the same sign once carried a commercial advertisement a year ago, then the sign does not qualify as an exempt sign, and it is banned regardless of the fact that it presently displays noncommercial speech.

The flaw in this regulatory scheme should be self-evident. Whether an offsite sign truly qualifies for exemption depends on factors that have absolutely nothing to do with the size, shape, position or physical characteristics of the billboard. To truly be exempt, it is not even enough to know the content of the *current* sign message. The sign is only exempt if the content of all messages ever displayed can be defended as "noncommercial." This restriction is indistinguishable from one declared unconstitutional by the First Circuit in *Ackerley Communications of Mass., Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989). In *Ackerley*, the Court found that a grandfather provision in the city's sign ordinance, which exempted some nonconforming signs only if they had contained noncommercial speech for a full year, was

unconstitutional since it discriminated based solely on prior content: "Somerville has chosen who may use nonconforming billboards by looking to past speech." *Id.* at 519. Nonconforming signs displaying only noncommercial messages for a year or more were exempt, but identically situated signs that had carried a commercial message anytime within a year were banned. The ordinance thus discriminated against only one category of speaker: those with a recent history of past commercial (but lawful) speech. *See also Ackerley Communications of Mass., Inc. v. City of Cambridge,* 88 F.3d 33 (1st Cir. 1996) (grandfathering provision in sign ordinance held unconstitutional for the same reason).

Houston has enacted a selective ban on commercial speech which is grossly underinclusive. A ban on offsite advertising signs, which exempts identical signs with noncommercial messages, does not advance the City's interests in esthetics and safety, and reaches more broadly than necessary because it cannot be defended as "reasonable fit" with those goals. In Houston's case, the problem is exacerbated by the fact that the definition of an exempt "noncommercial" sign depends not only on the message currently displayed. The sign is not exempt unless all messages it has ever displayed in the past also qualify as noncommercial. As in *Ackerley, supra,* it is indefensible to impose a ban on protected speech based solely on the content of past speech. Such restrictions impermissibly censor content, and have

no relation whatsoever to the goals of esthetics and safety.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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JANUARY 21, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-20701

RTM MEDIA, L.L.C.,

Plaintiff-Appellant,

versus

CITY OF HOUSTON,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(Filed Sep. 28, 2009)

Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges. JERRY E. SMITH, Circuit Judge:

RTM Media appeals a summary judgment for the City of Houston. We affirm.

I.

Houston's sign code threatens to eliminate most of the fifty-nine billboards owned by RTM, an outdoor advertising company. The city sued in state court,

accusing RTM of violating the sign code and being a public nuisance; RTM then sued in federal court, alleging that the code violates the First Amendment and that it cannot be enforced against billboards that have been separately licensed by the state.

RTM says that the First Amendment prohibits the sign code's disparate treatment of commercial and noncommercial speech. The code classifies signs as "on-premise" or "off-premise," depending on whether they provide information related to the premises on which they are located;[1] the code requires the abatement of off-premise signs. It excludes from regulation all noncommercial signs, defined as

> a structure that is used exclusively and at all times (except when there is no copy at all on the structure) for messages that do not constitute advertising, including, but not limited to, political messages, religious or church related messages, public service, governmental and ideological messages and

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[1] To be precise, according to the code, an on-premise sign is "any sign identifying or advertising the business, person, activity, goods, products or services primarily sold or offered for sale on the premises where the sign is installed and maintained when such premises is used for business purposes." SIGN CODE § 4603(a). An off-premise sign is "any sign that advertises a business, person, activity, goods, products or services not usually located on the premises where the sign is installed and maintained, or that directs persons to any location not on the premises." *Id.*

> other copy of a nature that is not commercial advertising. . . .

SIGN CODE § 4619(c).[2]

RTM also contends that Houston does not have the authority to regulate RTM's signs. The signs in question are located in the city's extraterritorial jurisdiction ("ETJ"), and the state Department of Transportation has issued state permits for them. RTM argues that the city does not have the right separately to regulate the ETJ and that any attempt to supersede the state permits is a due process violation.

At the outset of the federal litigation, the district court granted RTM's request for a preliminary injunction to prevent Houston from enforcing the code. The court determined that the code is probably unconstitutional and that RTM is therefore likely to succeed on the merits. A year later, however, the court reversed course and granted summary judgment for the city, explaining that commercial signs are far more numerous than are noncommercial ones, a fact that provides an adequate rationale for treating them

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[2] Thus, the familiar gas-station sign listing prices for various grades of gas qualifies as a permitted "on-premise" commercial sign, but a roadside billboard advertising "Shell Gas Station, Exit 5 Miles Ahead" is a prohibited "off-premise" commercial sign. Signs with non-commercial messages, such as "Attend Epiphany Catholic Church" or "All change is bad!", are not regulated by the code.

differently given the objective of reducing visual clutter and distraction along public roadways.

Having affirmed the constitutionality of the code, the court abstained on the ETJ issue so that it could be resolved in the pending state court proceedings. RTM appeals, reasserting that the code violates the First Amendment and contending that the district court should not have abstained.

II.

"We review grants of summary judgment *de novo*, applying the same legal standard used by the district court. Summary judgment is proper when the evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Chacko v. Sabre, Inc.*, 473 F.3d 604, 609 (5th Cir. 2006) (internal citations and quotation marks omitted).

III.

As recognized by the district court and the parties, the First Amendment issue is governed by *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). We therefore apply those decisions to the case at hand.

A.

In *Metromedia,* the Court addressed the constitutionality of a San Diego ordinance that permitted on-site commercial advertising, banned off-site commercial advertising, and allowed only certain content-specific categories of non-commercial advertising (e.g., "[t]emporary political campaign signs . . . maintained for no longer than 90 days and which are removed within 10 days after election [sic] to which they pertain.").[3] The ordinance therefore made three different kinds of speech distinctions: (1) Within commercial speech, it distinguished between on-premise and off-premise commercial speech; (2) within non-commercial speech, it distinguished between various categories of non-commercial speech; and (3) most broadly, it treated commercial speech differently from non-commercial speech. All three of those distinctions were challenged.

A fractured Court unambiguously held that the city could discriminate between on- and off-premise

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[3] *Metromedia,* 453 U.S. at 495-96 & n.3. "Thus, under the ordinance (1) a sign advertising goods or services available on the property where the sign is located is allowed; (2) a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; (3) noncommercial advertising, unless within one of the specific exceptions, is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages." *Id.* at 503.

commercial speech.[4] The Court began by noting that commercial speech enjoys lesser, intermediate-scrutiny constitutional protection. Commercial speech restrictions are evaluated under the four-part framework established in *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980):

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, 453 U.S. at 507 (citing *Cent. Hudson,* 447 U.S. at 563-66).

The Court acknowledged that the ordinance targeted signs that advertised lawful activity and were not misleading. It found that the city's goal of ameliorating traffic hazards and aesthetic unpleasantness was a sufficiently substantial interest. On

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[4] Justice White wrote the plurality opinion, which was joined in full by Justices Stewart, Marshall and Powell. Justice Brennan authored a concurring opinion joined by Justice Blackmun. Justice Stevens's partial concurrence agreed with the plurality's discussion of commercial speech but dissented from the discussion of non-commercial speech. Justice Rehnquist and Chief Justice Burger each dissented separately.

the fourth prong, it concluded that the city had not gone further than necessary to advance its interest.[5]

The Court therefore focused on whether the regulation directly advanced the city's objectives. The plaintiff argued that banning off-site commercial billboards would not further the city's interests, given that indistinguishable on-site advertising was allowed. The Court rejected that argument, holding that the First Amendment does not prohibit the city from choosing to "value one kind of commercial speech – onsite advertising – more than another kind of commercial speech – offsite advertising." *Id.* at 512. Accordingly, the city constitutionally could conclude that its interests in aesthetics and safety outweigh low-value offsite advertising but should yield to higher-value onsite advertising. *Id.*

The plurality struck down the ordinance's attempt to distinguish among various non-commercial messages, explaining that non-commercial speech is afforded greater constitutional protection, and "[a]lthough the city may distinguish between the relative value of different categories of commercial

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[5] "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs." *Metromedia,* 453 U.S. at 508.

speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Id.* at 514 (citations omitted). Therefore, "[b]ecause some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones." *Id.*

Finally, the plurality concluded that the ordinance could not favor on-premise advertising over non-commercial speech, because the First Amendment provides greater protection for non-commercial speech than for commercial speech.[6] Given San Diego's judgment that on-premise commercial speech outweighed its interest in safety and aesthetics, noncommercial speech must also outweigh that interest. Thus, "[i]nsofar as the city tolerate[d] billboards at all, it [could not] choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Id.* at 513.

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[6] *See id.* at 513 n.18 (criticizing courts that "have failed to give adequate weight to the distinction between commercial and noncommercial speech and to the higher level of protection to be afforded the latter.").

In summary, *Metromedia* established three key propositions. It held that (1) a billboard ordinance may permit on-premise commercial advertisement while banning off-premise commercial advertisement; (2) the ordinance may not distinguish among non-commercial messages on the basis of their content; and (3) where a city permits commercial billboards, it must also permit non-commercial ones.

B.

Twelve years after *Metromedia,* the Court revisited the issue of discriminating between commercial and non-commercial speech in *Discovery Network.* There, the City of Cincinnati was concerned about the proliferation of newsracks on city sidewalks. Rather than pass a new ordinance to address the issue, it began aggressively enforcing an old ordinance that outlawed commercial handbills. *Discovery Network,* 507 U.S. at 417. The city used the ordinance to remove newsracks that distributed commercial material, but it did not take any action to restrict identical newsracks that contained non-commercial material.

Because the ordinance was a regulation of commercial speech, the Court again applied the *Central Hudson* four-part test. This time, however, it focused on the fourth prong, which requires the city to demonstrate that the ordinance "is not more extensive than is necessary to serve" the asserted interest. *Cent. Hudson,* 447 U.S. at 566.

The court found that Cincinnati had not "establish[ed] the reasonable fit we require" to satisfy that prong. *Discovery Network,* 507 U.S. at 417 (quoting *Bd. of Trs. of State Univ. v. Fox,* 492 U.S. 469, 480 (1989)). The Court first noted that the ordinance preexisted the newsrack problem and was originally designed to combat the unrelated problem of handbill littering. Further, "the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number[, which] indicates that it has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Id.* (quoting *Fox,* 492 U.S. at 480). The Court also pointed out that noncommercial newsracks far outnumbered commercial newsracks:

> The benefit to be derived from the removal of 62 [commercial] newsracks while about 1,500-2,000 [non-commercial newsracks] remain in place was considered 'minute' by the District Court and 'paltry' by the Court of Appeals. We share their evaluation of the 'fit' between the city's goal and its method of achieving it.

Id. at 417-18.

The Court then rejected, in detail, the city's argument that there was a reasonable fit between the ban on commercial newsracks "and its interests in safety and esthetics because every decrease in the number of such dispensing devices necessarily effects an increase in safety and an improvement in the

attractiveness of the cityscape." *Id.* at 418. That argument relied on the premise that the city could treat commercial and noncommercial speech differently based on the relatively lower value of the former. But that justification put "too much importance on the distinction between commercial and noncommercial speech," which "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424. The commercial and noncommercial newsracks were identical and so were "equally at fault." *Id.* at 426.

The Court therefore concluded that "[i]n the absence of some basis for distinguishing between" commercial and noncommercial newsracks "that is relevant to an interest asserted by the city," the commercial newsrack ban was unjustified, because "the city [had] not established the 'fit' between its goals and its chosen means[.]" *Id.* at 428. The holding was "narrow," because it did "not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks." *Id.*

C.

RTM relies heavily on *Discovery Network* and argues that Houston has failed to articulate any reason for distinguishing between commercial and non-commercial billboards relevant to safety and aesthetics. As with the newsracks in *Discovery*

Network, there is little here that physically differentiates commercial from non-commercial billboards. RTM also interprets *Metromedia* as supporting its position, because there the Court disapproved of an attempt to treat commercial and non-commercial billboards differently.

Houston argues that *Discovery Network* is distinguishable, because here, there is a much better fit between the ordinance and the asserted interest: Commercial billboards make up the vast majority of signs targeted by the ordinance, so the benefit from the ordinance is not "paltry" or "minute." The city also says that *Metromedia* endorsed the approach of regulating commercial signs while permitting non-commercial ones.[7]

Houston is correct. *Discovery Network* plainly indicates that the "minute" benefit produced by the ordinance was critical to its invalidation.[8] Further,

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[7] *See id.* at 521 n.26 ("Since our judgment is based essentially on the inclusion of noncommercial speech within the prohibitions of the ordinance, *the California courts may sustain the ordinance by limiting its reach to commercial speech*, assuming the ordinance is susceptible to this treatment.") (emphasis added).

[8] In addition to the discussion in part III.B, *supra*, *see also Discovery Network*, 507 U.S. at 418 ("We accept the validity of the city's proposition [that every decrease in the number of newsracks necessarily effects an increase in safety and esthetics], but consider it an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, *and have only a minimal impact on the overall number of newsracks on the city's*

(Continued on following page)

the Court addressed the lack of difference between commercial and noncommercial newsracks only after agreeing with the district and appellate courts that the Cincinnati ordinance would have a minimal impact on aesthetics and safety. *Discovery Network,* 507 U.S. at 417-18. Finally, the Court stated that its holding was narrow and applies only where a city has failed to provide a justification for its differential treatment. *Id.* at 428. In short, *Discovery Network* held that because the city could not justify banning commercial newsracks based on the severity of their contribution to the city's problems (either from number or particularized harm), the city could not resort instead to an irrelevant devaluation of commercial speech.

That is not the case with Houston's sign code. As the district court correctly noted, the Houston code differs from the ordinance on almost all the "reasonable fit" considerations mentioned in *Discovery Network.* First, the handbill ordinance pre-existed

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sidewalks.") (emphasis added); *id.* at 426 (referring to "the fallacy of the city's argument that a reasonable fit is established by the mere fact that the entire burden imposed on commercial speech by its newsrack policy *may in some small way* limit the total number of newsracks on Cincinnati's sidewalks.") (emphasis added); *id.* at 427 (observing that in a related commercial speech case, "the fact that the regulation 'provide[d] only the most limited incremental support for the interest asserted' – that it achieved only a 'marginal degree of protection' for that interest – supported our holding that the prohibition was invalid.") (quoting *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 73 (1983)).

newsracks and was designed to combat littering rather than clutter; Houston's sign code was specifically crafted to address the safety and aesthetic concerns associated with billboards. Second, Cincinnati failed to regulate newsracks' size, shape, appearance, or number; the sign code establishes rules about all four. Finally, and most importantly, Houston produced substantial evidence that (1) the vast majority of area billboards are commercial, and (2) the sign code has been effective, reducing signage by approximately half over a twenty-eight-year period.[9]

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[9] Houston submitted an affidavit from its sign administrator describing city records about the number of sign fixtures and sign faces over time. RTM objected to her testimony as hearsay, but the court admitted it under the business records exception of Federal Rule of Evidence 803(6). RTM renews the objection on appeal.

We review evidentiary decisions for abuse of discretion. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 578 (5th Cir. 1993). RTM argues that the sign administrator testified about a twenty-eight-year period based on only two reports, which "belies the claim that it was a 'regular practice' of the City to make" those reports. As the city points out, however, it actually "produced to RTM twenty-six boxes of Sign Administration records that included hundreds of similar database reports[.]"

RTM also complains that, during the sign administrator's in-court testimony, she referred to the 1986 ETJ sign data as a "common knowledge number" that was just an estimate by her predecessor. But the administrator's affidavit stated that the number of signs in the ETJ in 1986 was "at least 5058 off-premise structures" based on business records; the in-court testimony RTM complains about is her estimate that the true number was closer to 7000. The district court did not abuse its discretion. And regardless of the precise numbers, it is plain that

(Continued on following page)

Thus, Houston has demonstrated that its approach to ameliorating the billboard problem is "carefully calculated" and that, because of their number, commercial billboards pose a greater nuisance than do noncommercial ones. Unlike Cincinnati, Houston does not need to justify its regulatory approach merely by placing a lower value on commercial speech. The sign code is therefore constitutional.[10]

IV.

RTM appeals the district court's decision to abstain.[11] The city replies that RTM waived its

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Houston's code has had more than a "minute" or "paltry" effect on the number of billboards.

[10] This conclusion accords with the one other circuit court decision that has directly confronted the same issue. *See Riel v. City of Bradford*, 485 F.3d 736, 753 (3d Cir. 2007) ("There is not a similar fit problem in the instant case. As the City has explained, 'the vast majority of signs within the City and the Historic District are commercial signs, and such signs tend to be erected for longer periods of time and tend to be larger and more elaborate in design.' Thus, regulating those signs directly advances the interests asserted by the City, and the provisions do not fall because of the holding in *Discovery Network*.").

[11] The district court exercised *Younger* abstention in deference to the pending state civil suit brought by Houston against RTM before this federal litigation. "Although *Younger* abstention originally applied only to criminal prosecutions, *see Younger v. Harris*, 401 U.S. 37 (1971), following *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 10-11 (1987), it also applies 'when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National

(Continued on following page)

objections to abstention by failing to address the issue after its reply in favor of a preliminary injunction. Again, the city is correct.

When RTM moved for injunction, the city argued in response that the district court should abstain. RTM replied that the court should not abstain, because (1) abstention is disfavored where the court is adjudicating First Amendment claims, (2) abstention is inappropriate where criminal prosecution has not commenced, and (3) abstention does not apply where the state court proceeding is brought in bad faith for the purpose of harassment.

The district court granted a preliminary injunction in September 2007 but explained that it would not abstain, because "facial challenges to statutes on First Amendment grounds have been exempted from the abstention doctrine[.]"[12] As a result of the court's announced intent to proceed, RTM and the city filed a joint motion to stay state court proceedings in October 2007.

Three months later, the city moved for summary judgment, arguing that the district court should abstain on "RTM's remaining non-First Amendment

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Government.'" *Health Net, Inc. v. Wooley*, 534 F.3d 487, 494 (5th Cir. 2008).

[12] *See Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965) ("We hold the abstention doctrine is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression[.]").

claims." RTM's response to that motion, filed February 2008, does not mention abstention. RTM filed its own motion for summary judgment in May 2008, which did not mention abstention. The city's response again asked the court to abstain on the non-First Amendment claims. RTM's June 2008 reply did not respond to those abstention arguments.

The district court granted summary judgment for the city in September 2008; in that order, it also granted abstention. At the time the order issued – and despite the city's repeated request that the court abstain – the last (and only) argument RTM had made regarding abstention was over a year before in its reply in support of the preliminary injunction.

On appeal, RTM makes a number of arguments against abstention that it never presented to the district court. It primarily contends that abstention is inappropriate because the state court proceedings had been stayed pending resolution of the federal suit. RTM failed not only to raise that point in district court but also to even bring the stay to that court's attention. Instead, it requests that we take judicial notice of the stay on appeal.

We will not reverse a district court based on issues not presented to it.[13] At best, then, we should

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[13] *See Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 701 (5th Cir. 2004) ("We have frequently said that we are a court of errors, and that a district court cannot have erred as to arguments not presented to it.").

consider only the arguments presented by RTM in its preliminary-injunction reply.[14] The single argument made both to the district court and this panel is that abstention is not appropriate because Houston has acted in bad faith. But "[t]he bad faith exception is narrow and is to be granted parsimoniously." *Wightman v. Tex. Supreme Ct.*, 84 F.3d 188, 190 (5th Cir. 1996). Further, more than an allegation of bad faith is required; the accuser must "must offer some *proof*." *Id.* at 191. RTM did not bear its burden of proof in the district court, where it submitted only the conclusional allegation that bad faith is "a description that fits both the state court civil suit against RTM and the threatened citation and prosecution of its advertisers."

Finally, RTM avers that the city waived its abstention argument by conducting full discovery and fully briefing the merits of the case in its various motions. As discussed above, however, the city consistently requested that the district court abstain.[15]

Because the sign code does not violate the First Amendment, and RTM has waived its arguments

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[14] At worst, we should not consider RTM's arguments at all, given that it repeatedly failed to respond to the city's requests for abstention in its summary judgment motions.

[15] *See O'Neill v. Coughlan*, 511 F.3d 638, 642 (6th Cir.) (explaining that for a state to waive *Younger* abstention, it must do so explicitly and rejecting the argument that "any request that the federal court reach the merits of the lawsuit constitutes waiver"), *cert. denied*, 129 S.Ct. 570 (2008).

against abstention, the summary judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

RTM MEDIA, L.L.C.,	}	
Plaintiff,	}	
	}	Civil Case
v.	}	No. 4:07-cv-2944
THE CITY OF HOUSTON,	}	
Defendant.	}	

MEMORANDUM OPINION AND ORDER

(Filed Sep. 29, 2008)

Presently before the Court are Defendant The City of Houston's Motion for Summary Judgment (Doc. 69) and Plaintiff RTM Media, L.L.C.'s Motion for Summary Judgment (Doc. 89). Having considered these documents, the responses and replies thereto, and the relevant legal authority, the Court hereby ORDERS that Defendant's motion (Doc. 69) is GRANTED and Plaintiff's motion (Doc. 89) is DENIED.

I. Background and Relevant Facts

Plaintiff RTM Media, L.L.C. ("RTM") initially filed suit against The City of Houston (the "City") on September 12, 2007 (Doc. 1). On September 14, 2007, RTM filed its First Amended Complaint and Motion for Temporary Restraining Order and Preliminary Injunction alleging that: (1) the Sign Code

unconstitutionally distinguishes between signs displaying commercial speech and signs displaying noncommercial speech; (2) criminalizing an activity permitted by the state violates due process; and (3) the Sign Code cannot legally or constitutionally be applied to persons who merely advertise on a billboard (Doc. 3). After holding a hearing, the Court issued an order granting RTM's motion for a preliminary injunction (Doc. 12). Subsequently, the Court held a second hearing and issued an Order Clarifying Preliminary Injunction Entered September 26, 2007, wherein it ordered as follows:

> [B]ecause there is a substantial likelihood that its content-based distinction between commercial and noncommercial speech violates the Free Speech Clause of the First Amendment, pending a trial on the merits, the City of Houston shall be enjoined (1) from enforcing its Sign Code, codified at Chapter 46 of the City of Houston Building Code, as to existing billboards in the [extra-territorial] jurisdiction of the City of Houston, against RTM Media, L.L.C., its advertisers, vendors, owners, lessors and/or lessees, and (2) from fining or threatening to fine advertisers placing advertisements on billboards owned by RTM Media, L.L.C.

(Doc. 36). Both Plaintiff and Defendant have filed motions for summary judgment. Before addressing the arguments presented in each of their briefs, as well as those in their responses and replies thereto, the Court provides the following factual background.

The City adopted the Sign Code in 1980 "to regulate signs and billboards and the permitting thereof" based on its findings that "the unregulated construction of signs, billboards, and other outdoor advertising structures can present" both "structural hazards which threaten the health and safety of the citizens of the City" and "impediments and dangers to traffic along City thoroughfares and easements." (Doc. 69 Ex. 1 at 000610). Additionally, the City found that "the continued construction of off-premise signs leads to the diminution of property values for adjacent properties and thereby adversely impacts on the taxable value of such affected properties," as well as an "increased risk of distraction and danger to citizens driving and walking on streets and thoroughfares due to Houston's present high volume of traffic on streets and thoroughfares." (*Id.* at 000611). Several provisions of the Sign Code are relevant to the Court's determination in the instant case.

The City's Sign Code defines "sign" as follows:

> [A]ny outdoor display, design, pictorial or other representation that shall be so constructed, placed, attached, painted, erected, fastened or manufactured in any manner whatsoever so that the same shall be ***used for advertising***. The term "sign" shall include the sign structure. Every sign shall be classified and conform to the requirements of each of such classifications set forth in this chapter.

(Doc. 69 Ex. 2 at 001035) (emphasis added). Specifically, an "off-premise sign" is defined as follows:

> [A]ny sign that advertises a business, person, activity, goods, products or services not usually located on the premises where the sign is installed and maintained, or that directs persons to any location not on the premises.

(*Id.* at 001038). In a section entitled "Abatement of Off-Premise Signs," the Sign Code states, in pertinent part:

> (b) Declared Nonconformity. All off-premise signs within the sign code application area are hereby declared to be nonconforming and unauthorized. The subject signs shall be removed following amortization as provided in Article 1, Section 6(k) of Chapter 221, Acts of the 69th Legislature, Regular Session, 1985.
>
> (c) Exclusion. The provisions of this section shall not be construed to require the removal of a structure that is ***used exclusively and at all times (except when there is no copy at all on the structure) for messages that do not constitute advertising, including, but not limited to, political messages, religious or church related messages, public service, governmental and ideological messages and other copy of a nature that is not commercial advertising because such a structure is not a "sign"*** (either on-premise or off-premise), as that term is defined, for purposes of this

> chapter and is not subject to regulation under this chapter. A structure that is subject to regulation under this chapter may contain noncommercial messages in lieu of or in addition to any other messages, but the structure shall not be exempt from regulation as a sign under this chapter unless used exclusively and at all times as provided above for non-commercial messages.

(*Id.* at 001106) (emphasis added). Additionally, the Sign Code prohibits new off-premise signs as follows:

> From and after the effective date, no new construction permits shall be issued for off-premise signs within the sign code application area. This prohibition shall apply to all classifications of signs, types of signs, and special function signs, and all other signs used as off-premise signs, including portable signs, with the exception that off-premise signs that advertise the sale or rental of real property or direct persons to the location of real property for sale or rental, which signs shall be limited to 40 square feet in area, shall continue to be permitted for a single three-year term.

(*Id.* at 001086). The distinctions between commercial and non-commercial speech made in these provisions form the basis of Plaintiff's First Amendment and equal protection arguments in the instant case.

The City has presented evidence on the effects the Sign Code has had on reducing the total number of billboards. Susan Luycx ("Luycx") has been

employed with the City since 1996 and was appointed to serve as the City's Sign Administrator in December 2005. (Luycx Decl., Doc. 69 Ex. 5 at 1). As the City's Sign Administrator, Luycx is responsible for enforcing the Sign Code. (*Id.*). Additionally, she is the custodian of records for the Sign Administration Department of the City's Code Enforcement Division. (*Id.*). Attached to her declaration are two exhibits, A and B.[1]

Exhibit A is a copy of a spreadsheet reflecting the inventory of off-premise signs existing in the City and its extra-territorial jurisdiction ("ETJ") as of September 13, 1996, as well as certain signs that had been removed prior to that date and since the Sign Code's enactment in 1980. (*Id.*) This spreadsheet shows that the number of off-premise signs in the City limits as of 1980, the year the Sign Code was enacted, and in the City's ETJ as of 1986, the year the City expanded the Sign Code's application area to cover the ETJ, was at least 8,119 off-premise sign faces and 5,058 off-premise sign structures. (*Id.*). As of September 1996, however, at least 2,124 sign faces and 1,358 sign structures had been removed. (*Id.*). Exhibit B is a spreadsheet reflecting the inventory of off-premise signs existing in the City and its ETJ as

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[1] Plaintiff RTM has objected to the City's evidence of the number of commercial and noncommercial signs, which is based on the Luycx declaration and exhibits thereto. The Court overrules RTM's objection and finds that this evidence is admissible hearsay under the business record exception in Federal Rule of Evidence 803(6).

of January 14, 2008. (*Id.* at 2). This spreadsheet states that the total number of off-premise signs in the City and its ETJ as of January 14, 2008, was 4,112 sign faces and 2,474 sign structures. (*Id.*). Therefore, based on these numbers, the total amount of off-premise sign faces and sign structures in the City and its ETJ has decreased by 50.64% and 48.91%, respectively.

Furthermore, Luycx states that, as of January 17, 2008, approximately 300 of the off-premise signs in the City and its ETJ possessed non-commercial messages. (*Id.*).[2]

Additionally, Plaintiff contends the City has violated its due process rights by acting without any legal basis in depriving Plaintiff of its property and destroying its business. Plaintiff's billboards at issue in this case are those on interstate and primary state highway systems beyond the City's limits but within its ETJ. "The [ETJ] of a municipality with 100,000 or more inhabitants, such as Houston, is 'the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located

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[2] Luycx bases her conclusion on the observations of Sign Administration personnel and data reported by sign companies maintaining signs in the City and its ETJ. Plaintiff RTM objects to this statement on hearsay grounds. The Court overrules this objection and finds that, based on Luycx's position as Sign Administrator, it is within her "sphere of responsibility" to oversee off-premise sign data maintenance and enforcement activity. *See DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005) (citations omitted).

within five miles of those boundaries.'" *Brooks v. State,* 226 S.W.3d 607, 608 (Tex. App. – Houston [14st Dist.] 2007) (citing Tex. Loc. Gov't Code Ann. § 42.021(5)). The City argues it can prohibit placement of billboards in the ETJ. RTM argues that it need not obtain permits from the City because it has obtained permits from the State for erecting and maintaining billboards in the City's ETJ.

Plaintiff further asserts that the Sign Code cannot legally or constitutionally be applied to persons who merely advertise on billboards, and, thus, the City cannot properly fine or threaten to fine Plaintiff's advertisers. The Sign Code includes a provision regarding permits, § 4605(a), which is instructive on this issue. It states:

> No person shall erect, reconstruct, alter, relocate, or ***use*** a sign within the sign code application area without first having secured a written permit from the Sign Administrator to do so, subject to the exceptions set forth in Section 4605(b).

(Doc. 69 Ex. 2 at 001048) (emphasis added).

In a letter dated August 29, 2007, Arturo Michel, the City Attorney advised John Ludke, "you, through your billboard advertising with RTM Media, LLC, are in serious violation of the City of Houston Sign Code and you may be subject to fines." (Doc. 75 Ex. 8). The City Attorney then referenced two provisions from the City's Sign Code, § 4605(a) and § 4604(d), and continued as follows:

> The City of Houston has cited the owner of the sign, RTM Media, LLC, more than 1,500 times to no avail. This letter serves as notice that 30 days from the date of this letter, the City of Houston intends to begin issuing citations to the advertisers who "use" these billboard signs that do not have the proper permits.
>
> Copies of the relevant sign ordinance provisions, Court of Appeals opinion upholding a $500 fine for "using a sign without a permit," a recent lawsuit filed by the City of Houston, and a list of the numerous RTM signs in violation are enclosed. If your advertisement appears on any of these signs, we will ticket you.
>
> We urge your voluntary cooperation by immediately stopping your participation in these illegal billboards.

(*Id.*). A similar letter was sent to each of RTM's advertisers. Plaintiff contests the City's interpretation of the term "use" in § 4605(a) to reach and fine its advertisers for their failure to obtain permits. It contends that the Sign Code only requires the "person" who erects, maintains, owns, or leases the billboard, in other words, the person who is responsible for and controls the sign, to obtain a permit.

In its most recent filing, a response to RTM's motion for summary judgment, the City makes three arguments with respect to the interpretation of "use" in § 4605(a). First, "the Court should decline to

exercise jurisdiction . . . because the claim entails no constitutional question and is merely a matter of construing a local ordinance." (Doc. 90 at 14-15). Second, "RTM lacks standing to assert the claim, which is predicated on the purported rights of RTM's advertisers rather than RTM itself." (*Id.* at 15). Lastly, and most significantly,

> [E]ven if RTM had standing to seek a declaration regarding the meaning of the Sign Code, the Court should decline to consider the claim because *the City hereby represents that it does not intend to pursue enforcement actions against RTM's advertisers (other than RTM) under current § 4605(a) of the Sign Code based upon the advertisers' placement of advertisements on RTM's sign structures.*

(*Id.* at 16) (emphasis in original).

II. Summary Judgment Standard

A party moving for summary judgment must inform the court of the basis for the motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *Hart v. Hairston,* 343 F.3d 762, 764 (5th Cir. 2003). The substantive law governing the suit identifies the essential elements of the claims at issue and, therefore, indicates which

facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna,* 401 F.3d 347, 349 (5th Cir. 2005). If the moving party fails to meet its initial burden, the motion must be denied, regardless of the adequacy of any response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

Once the movant meets its burden, however, the nonmovant must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex,* 477 U.S. at 323-24. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) (citing *U.S. v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)). Instead, the non-moving party must produce evidence upon which a jury could reasonably base a verdict in its favor. *Anderson,* 477 U.S. at 248; *see also DIRECTV Inc. v. Robson,* 420 F.3d 532, 536 (5th Cir. 2005). To do so, the nonmovant must "go beyond the pleadings and by [its] own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.,* 139 F.3d 532, 536 (5th Cir.1998). Unsubstantiated and subjective beliefs and conclusory

allegations and opinions of fact are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998); *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139-40 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994), *cert. denied*, 513 U.S. 871 (1994); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992). Nor are pleadings summary judgment evidence. *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1046 (5th Cir. 1996) (citing *Little*, 37 F.3d at 1075). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Nor is the court required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (citing *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992)).

Nevertheless, all reasonable inferences must be drawn in favor of the non-moving party. *Matsushita*, 475 U.S. at 587-88; *see also Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). Furthermore, the party opposing a motion for summary judgment does not need to present additional evidence, but may identify genuine issues of fact extant in the summary judgment evidence produced by the moving party. *Isquith v. Middle*

South Utilities, Inc., 847 F.2d 186, 198-200 (5th Cir. 1988). The non-moving party may also identify evidentiary documents already in the record that establish specific facts showing the existence of a genuine issue. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990). In reviewing evidence favorable to the party opposing a motion for summary judgment, a court should be more lenient in allowing evidence that is admissible, though it may not be in admissible form. *See Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir. 1988).

III. Discussion

A. First Amendment

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const., amend. I. The Due Process Clause of the Fourteenth Amendment makes the First Amendment applicable to the States. *Stromberg v. California*, 283 U.S. 359, 368 (1931). In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), the Supreme Court acknowledged, "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-63 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 457 (1978)). Nevertheless it observed that commercial speech "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal

interest in the fullest possible dissemination of information." *Id.* "The First Amendment's concern for commercial speech is based on the informational function of advertising," and, "[c]onsequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id.* at 563 (citation omitted). "The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." *Id.* at 563-64 (citations omitted).

No one in the instant case has alleged that the advertisements on Plaintiff's billboards were false, misleading, or related to illegal activity. Accordingly, the two-prong test outlined in *Central Hudson* shall apply. "The State must assert a substantial interest to be achieved by restrictions on commercial speech." *Id.* "The regulatory technique must be in proportion to that interest," and "[t]he limitation on expression must be designed carefully to achieve the State's goal." *Id.* The Supreme Court, thus, established the following two criteria to measure compliance with this requirement:

> First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id. at 564. The restriction does not have to be the least restrictive means available, but there must be a reasonable fit between the government's goals and the means chosen to accomplish those goals. *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469, 480 (1989). In the instant case, therefore, the issue is whether there is a "reasonable fit" between the City's interests in aesthetics, traffic safety, and protecting property values and the distinction made between commercial and noncommercial signs in the City's Sign Code.

In support of its First Amendment claim, RTM relies, almost exclusively, on *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993). In that case, the City of Cincinnati had an ordinance banning newsracks on public property that contained commercial publications while allowing those with noncommercial publications. The City of Cincinnati argued that this regulation would result in many fewer newsracks, thereby increasing safety and aesthetics in the city. Discovery Network, Inc. ("Discovery Network"), which advertised its adult educational, recreational, and social programs in a free magazine that was distributed on newsracks in Cincinnati, sued the city asserting the unconstitutionality of the ordinance. The Supreme Court determined,

> In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the

> "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills."

Id. at 428. The Supreme Court further noted, "[t]he city has asserted an interest in [a]esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing 'newspapers' or 'commercial handbills,' is equally unattractive." *Id.* at 425. The Supreme Court concluded,

> Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests.

Id. at 424 (emphasis in original).[3]

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[3] Additionally, the Court considered and rejected the City of Cincinnati's argument that the newsrack ordinance was a content neutral restriction because "the interests in safety and aesthetics that it serves are entirely unrelated to the content of respondents' publications." *Id.* at 429. The Court determined that the ordinance was neither content neutral nor a valid time, place, or manner restriction on speech: "Under the city's newsrack policy, whether any particular newsrack falls within the

(Continued on following page)

This case is, however, distinguishable. The Supreme Court in *Discovery Network* found that there was ample support in the record to conclude that the City of Cincinnati did not establish a reasonable fit as required by *Fox*. *Id.* at 417 (citing *Fox,* 492 U.S. at 480). The Supreme Court stated,

> [t]he ordinance on which [the City of Cincinnati] relied was an outdated prohibition against the distribution of any commercial handbills on public property. It was enacted long before any concern about newsracks developed. Its apparent purpose was to prevent the kind of visual blight caused by littering, rather than any harm associated with permanent, freestanding dispensing devices. The fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not "carefully calculated" the costs and benefits associated with the burden on speech imposed by its prohibition. The benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place was considered "minute" by the District Court and "paltry" by the Court of Appeals. We share their evaluation of the "fit" between the city's goal and its method of achieving it.

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ban is determined by the content of the publication resting inside that newsrack." *Id.*

Id. at 417-18 (footnote omitted). By contrast, the City here has addressed its concern about billboards by regulating their size, shape, appearance, and number. This illustrates that the City has strongly considered both the positive and negative effects [sic] its prohibition. Additionally, the benefits derived from the prohibition of off-premise commercial signs has neither been "minute" nor "paltry" as is demonstrated by the 50.64% and 48.91% decrease in sign faces and sign structures, respectively, from 1980 until 2008. This is drastically different than the minor effect the newsrack ordinance had in *Discovery Network,* and RTM's reliance on that case is misplaced.

In addition to *Discovery Network* being distinguishable, *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), is applicable to the instant case. The ordinance challenged in *Metromedia* permitted onsite commercial advertising, but it prohibited other commercial and noncommercial advertising which used fixed-structure signs unless it was covered by one of the ordinance's twelve exceptions. The Supreme Court, in a plurality opinion, found that, insofar as the ordinance regulated commercial speech, it satisfied the *Central Hudson* test. The Court found that improving traffic safety and the appearance of the city were substantial government goals and that the ordinance was no broader than necessary to accomplish such goals. *Id.* at 508.

Finally, various other courts have upheld similar ordinances to the one at issue here, by relying on *Metromedia* and/or by distinguishing *Discovery*

Network. For example, in *Paradigm Media Group v. City of Irving,* No. 3:01-CV-612-R, 2002 WL 1776922 (N.D. Tex. July 30, 2002), the issue presented was whether the City of Irving's commercial billboard ban, which provided exceptions for, among other things, advertising structures on the same site as large sports facilities, violated the First Amendment. The district court, relying on *Metromedia* and its application of the commercial speech framework of *Central Hudson,* determined that the ordinance was narrowly tailored and passed constitutional muster:

> If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. [I]ndeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs.

Paradigm Media Group, 2002 WL 1776922, at *7 (quoting *Metromedia,* 453 U.S. at 508; citing *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 810-16 (1984)). In *Paradigm Media Group,* the court found that there were "opportunities for commercial speech through the medium of signs [which] assure that such form of expression is not suppressed, while at the same time

the prohibition on new billboards effectively advances the City's aesthetic objectives."[4] *Id.* The court, therefore, found that the City of Irving was entitled to summary judgment on Plaintiff's First Amendment claim, and the Fifth Circuit affirmed this decision. *See Paradigm Media Group, Inc. v. City of Irving,* 65 Fed. Appx. 509 (5th Cir. 2003).

Other cases from outside of the Fifth Circuit also provide persuasive authority on this issue. For example, in *Riel v. City of Bradford,* 485 F.3d 736 (3rd Cir. 2007), the court found that city ordinances regulating the display of commercial and noncommercial signs on private property without first obtaining a permit were constitutional under the First Amendment. In addressing the issue of whether a city's goals "fit" its methods of achieving such goals, the *Riel* court stated,

> [a]s the City has explained, "the vast majority of signs within the City and the Historic District are commercial signs, and such signs tend to be erected for longer periods of time and tend to be larger and more elaborate in design." Thus, regulating those signs directly advances the interests asserted by the City, and the provisions do

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[4] The City of Irving ordinance allowed outdoor advertising in three circumstances: "(1) onsite monument and pole signs; (2) on billboards and advertising structures that pre-existed the ban adopted on June 3, 1999; and (3) prospectively, on advertising structures at sports facilities." *Id.* (footnote omitted).

> not fall because of the holding in *Discovery Network*.

Id. at 753 (citing to *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 190 (1st Cir. 1996) (upholding a regulation prohibiting commercial news racks in an historic Boston neighborhood because the benefit was not "minute" and "paltry" as it was in *Discovery Network*); *Infinity Outdoor, Inc. v. City of New York*, 165 F.Supp.2d 403, 420 (E.D.N.Y. 2001) (holding that a billboard regulation that distinguished between off-site commercial signs and off-site noncommercial signs did not fall under *Discovery Network* because the regulation had "more than a minimal impact on the overall number of billboards")).

Accordingly, the Court accepts the City's argument that there is a "reasonable fit" between the distinction between commercial and noncommercial speech and its goals of aesthetics, traffic safety, and protecting property values. The Court, therefore, finds that the City's Sign Code is constitutional under the First Amendment.

B. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment states, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. In its motion for summary judgment, Plaintiff RTM argues that the Sign Code's distinction between commercial and

noncommercial signs violates the Equal Protection Clause. "Because regulation of commercial speech is subject to intermediate scrutiny in a First Amendment challenge, it follows that equal protection claims involving commercial speech also are subject to the same level of review." *Chambers v. Stengel*, 256 F.3d 397, 401 (6th Cir. 2001) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 n.4 (1992) (noting that the First Amendment underlies the Court's equal protection analysis)). "Strict scrutiny is clearly inappropriate." *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (*en banc*). The Court found that the Sign Code satisfied the intermediate scrutiny standard set forth in *Central Hudson*. Accordingly, the Court finds that Plaintiff's equal protection claim must also fail.

C. Due Process Clause

Under the regulations issued pursuant to the Federal Highway Beautification Act, the State is authorized to "set criteria for size, lighting, and spacing of outdoor advertising signs located in commercial or industrial zoned or unzoned areas . . . adjacent to Interstate and Federal-aid primary highways." 23 C.F.R. § 750.706(a). Additionally, "[i]f the zoning authority has been delegated, extraterritorial, jurisdiction under State law, and exercises control of outdoor advertising in commercial and industrial zones within this extraterritorial jurisdiction, control by the zoning authority may be accepted in lieu of agreement controls in such areas." 23 C.F.R.

§ 750.706(c)(3). Plaintiff argues that federal regulations do not allow the State, without risking highway funding, to cede control of signs along federally funded highways in the ETJ if the City does not zone the ETJ. Under the regulations, therefore, Plaintiff asserts that the City cannot assume control of signs in the ETJ from the State because the City does not have zoning. Additionally, Plaintiff maintains that since the State has not, in fact, ceded control of the ETJ to the City and because the State does issue permits for billboards in the ETJ, Plaintiff is not required to seek an additional permit from the City.[5]

The Due Process Clause of the Fourteenth Amendment states, in pertinent part, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. In the instant case, Plaintiff alleges the City acted without any legal basis to deprive Plaintiff of its property and destroy its business. A resolution of this issue turns on whether the City or the State, at all relevant times, maintained control over the City's ETJ. Because Plaintiff asks the Court to order relief that would likely interfere with the ongoing state court action of *City of Houston v. Brooks, et al.* (Cause

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[5] Plaintiff notes that a new law was enacted in the 2007 session of the Texas Legislature which forbids the Texas Department of Transportation from issuing a permit in the City or in the ETJ unless the City has issued a permit. Tex. Transp. Code § 391.068.

No. 2007-42941), the Court declines to decide this issue under the doctrine announced in *Younger v. Harris,* 401 U.S. 37 (1971).

"The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Moore v. Sims,* 442 U.S. 415, 423 (1979) (citing *Samuels v. Mackell,* 401 U.S. 66, 69 (1971)). *Younger* abstention "is generally deemed appropriate [when] assumption of jurisdiction by a federal court would interfere with pending state proceedings, whether of a criminal, civil, or even administrative character." *Louisiana Debating and Literary Ass'n v. City of New Orleans,* 42 F.3d 1483, 1489 (5th Cir. 1995) (quoting *Word of Faith World Outreach Center Church, Inc. v. Morales,* 986 F.2d 962, 966 (5th Cir.), *cert. denied,* 510 U.S. 823 (1993)). The Court must apply the following three-prong test to determine whether *Younger* abstention applies: "(1) the dispute must involve an 'ongoing state judicial proceeding,' (2) an important state interest in the subject matter of the proceeding must be implicated, and (3) the state proceedings must afford an adequate opportunity to raise constitutional challenges." *Texas Ass'n of Bus. v. Earle,* 388 F.3d 515, 519 (5th Cir. 2004) (citing *Wightman v. Tex. Supreme Ct.,* 84 F.3d 188, 189 (5th Cir. 1996)). If all three elements of this test are met, the Court must abstain unless one of the following exceptions applies:

> (1) the state court proceeding was brought in bad faith or with the purpose of harassing the federal plaintiff, (2) the state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it," or (3) application of the doctrine was waived.

Id. (citations omitted).

Facial challenges to statutes on First Amendment grounds have been exempted from the abstention doctrine, which, itself, is "the exception and not the rule." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976). The Supreme Court has held that "the abstention doctrine is inappropriate ... where ... statutes are justifiably attacked on their face as abridging free expression[.]" *Dombrowski v. Pfister,* 380 U.S. 479, 489-90 (1965). In cases involving facial challenges based on the First Amendment, the Supreme Court has been "particularly reluctant to abstain." *City of Houston v. Hill,* 482 U.S. 451, 467-68 (1987) (citations omitted). "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Id.* (quoting *Zwickler v. Koota,* 389 U.S. 241, 252 (1967)). In the instant case, the Court declined to abstain from exercising jurisdiction at the time it issued the preliminary injunction because the City's

Sign Code was being attacked on First Amendment grounds. Now that the Court has decided this constitutional issue, it shall abstain from exercising jurisdiction over Plaintiff's due process claim for the reasons set forth below.

First, this dispute involves the ongoing state judicial proceeding of *City of Houston v. Brooks, et al.* (Cause No. 2007-42941) in the 295th District Court of Harris County, Texas, which includes causes of action for public nuisance, violations of two different provisions of the Sign Code, and unjust enrichment. The City's argument in state court is that the defendants knowingly and intentionally violated the Sign Code and that these violations resulted from the defendants' construction and maintenance of off-premise signs within the City's ETJ and their failure to secure written permits from the City for these signs. Therefore, in order for the state court to resolve the City's claim, it appears that it must determine which entity, the State or the City, maintained control of the City's ETJ.

Second, the Court finds that an important state interest in the subject matter of the proceeding in *City of Houston v. Brooks, et al.* is implicated. Texas has a significant interest in overseeing billboard construction on its highways, as these structures affect traffic safety, property values, and aesthetics. Additionally, Texas, in order to be eligible for federal funding, must ensure that its highways conform to federal requirements. Therefore, issues as to which entity oversees and grants permits for billboards in

the City's ETJ and whether the conduct of the defendants in *City of Houston v. Brooks* constitutes a public nuisance and a violation of the City's Sign Code are of critical importance to Texas.

Finally, the parties have an adequate opportunity to raise constitutional challenges in the state court action of *City of Houston v. Brooks*. Additionally, the Court notes that, based on the briefing submitted to the Court, it appears that RTM's due process claim is one that involves a constitutional question under Texas, as opposed to federal, law.[6] It seems, therefore, that Texas state court would be the more appropriate forum in which to address Texas constitutional issues. Consequently, the Court hereby abstains from addressing Plaintiff's due process claim in the instant case.

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[6] RTM argues, "[a]s the State of Texas, and not the City of Houston, controlled the regulation of signs in the extraterritorial jurisdiction, once the State had issued a permit for the erection of a sign, the City could not nullify that action by forbidding the sign to be erected or by punishing the person who erected the sign." (Doc. 89 at 9). RTM further states, "[a] city cannot 'make illegal that which is legal under the laws of the State of Texas,'" as it cites to *City of Wichita Falls v. Abell*, 566 S.W.2d 336, 339 (Tex. Civ. App. – Ft. Worth 1978, writ ref'd n.r.e.) and *City of Baytown v. Angel*, 469 S.W.2d 923, 925 (Tex. Civ. App. – Houston [14th Dist.] 1971, writ ref'd n.r.e.). (*Id.*). Both of these cases stand for the proposition that a municipal ordinance that is inconsistent with state law violates the Texas Constitution.

D. Applicability of the Sign Code to Advertisers

Lastly, Plaintiff argues that the Sign Code cannot legally or constitutionally be applied to persons who merely advertise on billboards. This argument is based on Plaintiff's interpretation of the term "use" in § 4605(a) of the City's Sign Code. RTM contends that the Sign Code only requires the "person" who erects, maintains, owns, or leases the billboard, in other words, the person who is responsible for and controls the sign, to obtain a permit. Plaintiff concludes, therefore, that the City cannot properly fine or threaten to fine Plaintiff's advertisers.

Based on language in the City's response to Plaintiff's motion for summary judgment, wherein the City represents that "*it does not intend to pursue enforcement actions against RTM's advertisers (other than RTM) under current § 4605(a) of the Sign Code based upon the advertisers' placement of advertisements on RTM's sign structures,*" (Doc. 90 at 16) (emphasis in original), the Court declines to resolve the proper interpretation of the term "use" in § 4605(a) to ascertain whether it should, in fact, apply to Plaintiff's advertisers.

IV. Conclusion

Accordingly, it is hereby

ORDERED that Defendant's motion (Doc. 69) is GRANTED and Plaintiff's motion (Doc. 89) is DENIED. It is further

ORDERED that, because the City has represented that "it does not intend to pursue enforcement actions against RTM's advertisers (other than RTM) under current § 4605(a) of the Sign Code based upon the advertisers' placement of advertisements on RTM's sign structures" (Doc. 90 at 16) (emphasis omitted), the City is prohibited from pursuing such enforcement actions.

SIGNED at Houston, Texas, this 29th day of September, 2008.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

RTM MEDIA, L.L.C.,	}	
Plaintiff,	}	
	}	Civil Case
v.	}	No. 4:07-cv-2944
THE CITY OF HOUSTON,	}	
Defendant.	}	

FINAL JUDGMENT

(Filed Sep. 29, 2008)

Pursuant to the Memorandum Opinion and Order issued on today's date, the Court hereby ORDERS that Defendant The City of Houston's Motion for Summary Judgment (Doc. 69) is GRANTED.

Accordingly, final judgment in favor of Defendant The City of Houston and against Plaintiff RTM Media, L.L.C. is hereby entered.

SIGNED at Houston, Texas, this 29th day of September, 2008.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RTM MEDIA, L.L.C.,	§	
Plaintiff,	§	
	§	
vs.	§	C.A. NO. H-07-2944
	§	
CITY OF HOUSTON,	§	
Defendant.	§	

OPINION, PRELIMINARY INJUNCTION ORDER, AND SCHEDULING ORDER

Pending before the Court in the above referenced cause, pursuant to Federal Rule of Civil Procedure 65, is Plaintiff RTM Media, L.L.C.'s motion for temporary restraining order and preliminary injunction (instrument #3) enjoining Defendant the City of Houston ("the City") (1) from enforcing its Sign Code, codified at Chapter 46 of the City of Houston Building Code, because its content-based distinction between commercial and noncommercial speech violates the Free Speech Clause of the First Amendment[1] and (2) from requiring advertisers using the billboards to have a permit. A hearing was held on matter on September 20, 2007.

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[1] "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const., amend. I. The Due Process Clause of the Fourteenth Amendment makes the First Amendment applicable to the States. *Stromberg v. California*, 283 U.S. 359 (1931).

In this action, Plaintiff, a company that builds and maintains billboards, seeks declaratory and injunctive relief relating to the City of Houston's ordinance regulating billboards. Passed in 1980, the Sign Code (filed at Court request as #8) regulates "signs," which it defines as "[a]ny outdoor display, design, pictorial or other representation that . . . shall be used for advertising." Section 4602. The Code excludes from the definition any "structure that is used exclusively and at all times . . . for messages that do not constitute advertising, including, but not limited to, political messages, religious or church related messages, public service, governmental and ideological messages and other copy of a nature that is not commercial advertising because such a structure is not a 'sign'," in other words, billboards containing noncommercial speech. Section 4619(c). Plaintiff contends that the Sign Code thus discriminates between signs for commercial speech, which it regulates or prohibits, and signs for noncommercial speech, which it allows to proliferate. The Code provides for the gradual removal of "non-conforming" signs and forbids the construction of any new "off premise" commercial signs (signs advertising a business not located on the premises). Section 4612(b). The stated purpose of the ordinance is to improve aesthetics, traffic safety, and property values.

Plaintiff claims that for twenty years the City of Houston and the State of Texas have disputed which of them controls billboards on interstate and primary state highway systems beyond Houston's city limits

but inside [sic] City's the extraterritorial jurisdiction[2] ("ETJ").[3] The City argues it can prohibit placement of billboards in the ETJ and has demanded that the State stop issuing permits for billboards in this location. Plaintiff has obtained permits from the

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[2] City of Houston defines the ETJ as "the unincorporated area contiguous to the City's boundaries that is located within five miles of those boundaries pursuant to Chapter 42 of the Texas Local Government Code." Ex. A to #7, City's Original Petition in state court suit in the 295th Judicial District of Harris County, Texas at 2-3.

[3] Under the regulations issued pursuant to the Federal Highway Beautification Act, the State is authorized to "set criteria for size, lighting and spacing of outdoor advertising signs located in commercial or industrial zoned or unzoned areas . . . adjacent to Interstate and Federal-aid primary highways . . . If the zoning authority has been delegated, extraterritorial, jurisdiction under State law and exercises control of outdoor advertising in commercial and industrial zones within this extraterritorial jurisdiction, control by the zoning authority may be accepted in lieu of agreement controls in such areas." 23 C.F.R. § 750.706(a) and (b)(3). Plaintiff argues that federal regulations do not allow a state, without risking highway funding, to cede control of signs alongside federally funded highways in an ETJ if the city does not zone the ETJ. Houston has no zoning and thus cannot assume control of the signs in its ETJ from the State of Texas under the regulation. Plaintiff further points to 23 C.F.R. § 750.706(c)(3) (city control may be accepted "in lieu of" a state permit) and maintains that since the State of Texas has not ceded control of the ETJ to the City and since the State does issue permits for billboards in that ETJ, Plaintiff is not required to seek an additional permit from the City. It does note that recently the Legislature changed the law to bar the State from issuing sign permits in the City's ETJ, but that fact confirms that when Plaintiff obtained its permits from the State, they were all it was required to obtain.

state, but has not applied for permits from the City, and has erected and maintained billboards in the City's ETJ. The City has ticketed Plaintiff for this conduct,[4] and Plaintiff states that it has contested the tickets in Municipal Court.

In addition, regarding permitting, the Sign Code states, "No person shall erect, reconstruct, alter, relocate, or use a sign. . . . without first having obtained a written permit. . . . " Section 4605(a). According to Plaintiff, on August 30, 2007, the City Attorney mailed a letter[5] to all of Plaintiff's advertiser customers warning they would be subjected to criminal fines of $500 per day if they continue to use a sign without obtaining a permit within thirty days. Plaintiff contests the City's interpretation of the term "use" in "use a sign" in Section 4605(a) to reach and to fine its advertisers for their failure to obtain permits. It contends that the Sign Code only requires the "person" who erects, maintains, owns, or leases the billboard, in other words, the person who is responsible for and controls the sign, to obtain a permit.[6] At

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[4] At the hearing counsel for the City estimated that it has issued Plaintiff about 200 tickets and that Plaintiff has recently refused to appear in court to contest them. Nevertheless the City apparently has not sought to arrest or prosecute Plaintiff for its failure to appear.

[5] Ex. A to the First Amended Complaint (#3). Plaintiff has also attached as Ex. B a list of its advertiser clients to whom the letter was sent.

[6] "Use" is not defined in the Code, so Plaintiff looked to the Code as a whole to determine its meaning. Noting that there is

(Continued on following page)

the hearing Plaintiff's counsel further argued that by targeting the advertiser the city was targeting the content of the billboard.

If Plaintiffs succeed on the merits of their action they seek as a remedy a declaration that on its face Chapter 46(1) violates the Free Speech Clause of the

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no provision in the Code that requires an advertiser to perform any act, the City points to Section 4605(c)(2) regarding "Application Procedure"; it requires that "Every application shall be executed and verified under oath by both the owner of the premises upon which the sign is to be or has been constructed, or the authorized lessee of such premises, and the sign company if the sign is an off-premise sign . . . and shall contain the sworn affidavit of the owner or lessee and the sign company that the sign does not violate any applicable deed restriction or other similar restrictions on the premises." It does not mention an advertiser.

The City responds that Plaintiff misconstrues the City's application of the ordinance. It does not seek to require an advertiser to apply for a permit, but intends under section 4605 ("[n]o person shall erect, reconstruct, alter, relocate or use a sign within the sign code application area without first having secured a written permit from the Sign Administrator to do so") to issue citations to advertisers who "use" the signs for which the "owner, lessee or person responsible for the sign" has not obtained a permit. To Plaintiff's assertion that the City lacks the power to prohibit use of a sign by an advertiser, the City finds that authority in section 216.90 of the Texas Local Gov't Code Ann. (Vernon 2007) providing that "[a] home-rule municipality may license, regulate, control or prohibit the erection of signs or billboards. . . ." At the hearing counsel further argued that since the City had been unable to force Plaintiff to stop erecting signs without permits, it "finally found a means to stop them" – i.e., ticketing and fining its advertising clients, who would then stop doing business with Plaintiff.

First Amendment of the United States Constitution because it discriminates based on content between commercial speech (advertising, here) and noncommercial speech and (2) violates the Due Process Clause of the Fourteenth Amendment because it attempts to prohibit what state law permits. Additionally Plaintiff seeks a declaration that the term "use" in the Sign Code does not mandate that an advertiser must have a permit because such a construction of the regulation is inconsistent with the language and purposes of the Code, violates the First and Fourteenth Amendments of the federal Constitution, and violates the Texas Constitution because it is inconsistent with State law.

The City filed a civil suit[7] against Plaintiff in state court to force it to remove its off-premises billboards and to recover the income Plaintiff has received from these billboards. Plaintiff's answer in state court is due by September 28, 2007.

Preliminary Injunctive Relief

Today, this Court addresses only the request for a preliminary injunction and not the merits of the case.

The City has raised some threshold issues that need to be addressed before reviewing the elements for an injunction.

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[7] The Original Petition is Ex. A to #7.

First, the City argues that this Court should abstain from exercising jurisdiction under *Younger v. Harris,* 401 U.S. 37 (1971) because the City has instituted both civil and criminal proceedings in state court against Plaintiff to enforce its Sign Code and Plaintiff has an adequate opportunity to raise its constitutional challenges in those state proceedings.

A *Younger* abstention is usually appropriate when "assumption of jurisdiction by a federal court would interfere with pending state proceedings, whether of a criminal, civil, or even administrative character."[8] *Word of Faith World Outreach Center Church, Inc. v. Morales,* 986 F.2d 962, 966 (5th Cir.), *cert. denied,* 510 U.S. 823 (1993). To make that determination, the court examines several factors: (1) whether the state proceedings "constitute an ongoing state judicial proceeding"; (2) whether the proceedings "implicate important state interests"; and (3) whether the federal plaintiff would have "an adequate opportunity in the state proceedings to raise constitutional challenges." *Louisiana Debating an* [sic] *Literary Assoc. v. City of New Orleans,* 42 F.3d 1483, 1490 (5th Cir. 1995). The state proceedings must be ongoing and judicial in nature. *Id. See also Texas*

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[8] Although originally the *Younger* doctrine applied only where state criminal proceedings were ongoing, it has been expanded to civil and administrative proceedings where they are "judicial" in nature. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.,* 477 U.S. 619 (1986). It is not clear to this Court whether criminal prosecution of Plaintiff has commenced in state court; the parties disagree over the issue.

Association of Business v. Earle, 388 F.3d 515, 518-21 (2004).

Nevertheless facial challenges to statutes on First Amendment grounds have been exempted from the abstention doctrine, which, itself, is "the exception and not the rule." *Colorado River Water Conserv. Dist. v. United States,* 424 U.S. 800, 813 (1976). In *Dombrowski v. Pfister,* 380 U.S. 479, 489-90 (1965), the Supreme Court held that "the abstention doctrine is inappropriate . . . where . . . statutes are justifiably attacked on their face as abridging free expression. . . ." *See also City of Houston, Tex. v. Hill,* 482 U.S. 451, 467-68 (1987) ("[W]e have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment. . . . 'In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.'") *Id., citing and quoting Dombrowski,* 380 U.S. at 489-90, and *Zwickler v. Koota,* 389 U.S. 241, 252 (1967).

Second, the City challenges Plaintiff's standing to bring suit on behalf of the advertisers.

Standing is a jurisdictional requirement that may not be waived. *Lewis v. Casey,* 518 U.S. 343, 349 n.1 (1996). To have standing, a plaintiff must show that he personally suffered some actual or threatened injury, that the injury is fairly traceable to the defendant's challenged action, and that the relief that

Plaintiff contends : it was unreasonable to conceal the terms of the settlement from the class; it was unreasonable to require acceptance of dysfunctional software, and; it was unreasonable to expect any class to read a remote stipulation approved by a Court with an eye toward discovery of unlawful actions by either the court or class-representatives

Because that settlement was not timely-discovered as flawed, it passed into finality As shown, those flaws were concealed through other complex machinations to prevent discovery This case was never made against the settlement or the presiding Texas Court This case is made against the unlawful behaviors of the Defendants who benefitted from violation of Federal Law

The Private Securities Litigation Reform Act (P S L R A) at §78u-4(a)(4) (as paragraph 4) precisely forbids court discretion from granting "any settlement" (consideration) which is not shared pro-rata (per share basis) with the class Such defines "fairness" in reformed class-action law; and, by limiting court discretion, supercedes a court pronouncement of fairness under Federal Rules of Civil Procedure Rule 23 (specifically 23(a)(4))

A conflict-of-interest was first engaged within class-representatives' negotiation for unshared control over Board of Director's Seats That negotiation used valuable class-time that was to be spent seeking equitable recovery for the entire class Plaintiff also contends a conflict-of-interest by representatives is fraud.

In P S L R.A at §78u-4(a)(2)(A) is the requirement of "Sworn Certificate" as a public assurance that the reformed-law and its provisions would be honored by the would-be Lead-Plaintiff, Regents The Lead-Counsel is likewise bound by the Regents' certification to represent the class because that legal representation is directed by Lead-Plaintiff

Within those provisions at §78u-4(a)(2)(A)(iii) is agreement of "willing[ness]" to serve as a representative-party on behalf of a class" Such representation necessarily must be lawful to be of service to the class.

Within those provisions at §78u-4(a)(2)(A)(vi) is agreement "plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery," That provision, within that same paragraph 2, describing representative's terms of obligation, refers to and incorporates paragraph 4, §78u-4(a)(4) (described above), as defines the restriction to court discretion, and, so , what is legitimate for class-representatives to bargain for in a settlement is within the terms specific to class-representation

Plaintiff further contends the unshared consideration to power and control is a form of valuable consideration, was specifically outside the court's discretion to even grant, and, such class-representation is necessarily rendered unlawful by P S L.R.A reform-law provisions Therefore, such class-representation as was committed through a variety of behavioral anomalies within the Dynegy

Securities Litigation settlement are behaviors of fraud and malpractice as alleged

The negotiation and acceptance of the settlement on terms that granted benefit to the power and control over two positions on the Dynegy Board of Director's is admitted by Defendants Petitioner had calculated the value of those two Directors' Seats for the courts at 339 Million Dollars

Plaintiff maintains contention that such value induced settlement to occur, caused that unfair and unlawful merging of interests against the class' interests, and reduced the shared-portion of recovery for the class

Direct Argument Supporting Grant of Rehearing

This Petition for Rehearing is made within the context of S Ct Rule 44 to the best of my understanding. Within the confinement of such petition to ".. intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.", the following individual issues seem both substantial and controlling :

1 Excessive Process

As per S.Ct Rule 10(a) the decisions of the 5th Circuit Court of Appeals to deny this Plaintiff's Appeal has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an

exercise of this Court's supervisory power The 5th Circuit refusal to recognize the existence of a federal law as a judgment factor and make proper Judicial Notice under MANDATORY Federal Rules of Evidence (F.R E) Rules (cited) is without question such a departure and has evidently been overlooked by this Supreme Court

The effect of that departure seeks to complete not only an anti-reform-law agenda in defiance of the specific Private Securities Litigation Reform Act (P S L.R.A) law provisions cited (that were intended to protect class interests from conflicts-of-interest by a Lead-Plaintiff) , and, also, effectively removes the courts of the 5th Circuit from uniform application of the F R E A Supreme Court failure to cause an opinion in explanation regarding that Judicial Notice to actually be issued repudiates the mandatory F R E requirement applicable to U S Courts of Appeals

The further effect of failure to grant Certiorari is, thereby, one of this Supreme Court fixing the departure from accepted and usual Rules by the 5th Circuit after-the-facts of both the Judicial Notice requirement first being breached and the controlling P.S L.R.A. law provisions thus evaded Such a final solution dissolves all opportunities of The People to timely application within the lower courts of those laws established by Congress and endorsed by The Executive To, thereby, burden Plaintiffs with appeals to ever-higher courts and so clutter dockets through the delay in application or non-application of the laws or rules levies an excessive process As inexperienced, this Petitioner has no way to evaluate if that "excessive process" is

the present state of "accepted and usual judicial proceedings"and can only hope that such is not present in this court's opinion. However, it is axiomatic that, in judicial processes , abiding by rules and laws is the accepted and usual course of proceedings

2. Will of The People/Inadequate Process

In the Supplemental Appendix filed with the Petition, The Texas Court dismissal of the case is based on a Defendants' Rule 12(c) Motion that requires a presupposition that Plaintiff has described the truth and that for one reason or another the Plaintiff has made no actionable claim by rule or law The Texas Court elaborated a vast amount of basis, discounted issues of specific Defendants' admissions, and entirely disregarded Plaintiff's law and rule cites in order to accommodate its conclusions It is an epitome of injustice that a court dismissal based on an absence of law or rule is privileged to affirmation on appeal when legitimate basis in law or rule actually was timely presented for consideration and purposefully ignored As was shown, the matter of lower court's ignoring the evidence of pertinent law and violation is beyond those court's discretion The resistance to applying the reform-law is the attractor for the appearance of a profusion of coincident anomalies heaped on this case by Defendants and courts to obfuscate those Plaintiff truths ; as was remarked, "mistakes" all made in someone else's favor, are not mistakes at all. The pattern of twisting toward that resistance

to reform is too obvious for any neutral researcher to miss accidently

In consequence of the exercise of excess court discretion in such matters, ignoring the law for political or other purposes would allow a new standard-procedure which negates the purpose of law administration for which the courts are Constitutionally Chartered in the U S Constitution. Ignoring the laws to allow a case to be proceeded in favor of a conflict-of-interest-wrongdoing is not legitimate administration , and, the absence of this Supreme Court's grant of a petition for supervision assures that such as has happened continues to happen The paragraph 4 command within P S L R.A provisions cited to this case that "any settlement" must be wrought to favor a class' interests to share and share alike, must be heeded That provision is purposefully written to restrict court discretion Therefore, this case must be seen to warrant the reasoned Opinion of a Federal Court in actual address of the cited Federal Law and not allow the present state, in which, pertinent law as was reformed by the Will of The People is to be ignored by misguided, lower-court discretion

With a consideration for the cited law actually applied, the Plaintiff's case is positively proven , that "share and share alike" was not performed and that the facts of actual terms in the Dynegy Settlement were concealed Plaintiff ,thereby, concludes his case was intentionally misconstrued to avoid consequences of the reform-law violation Because the matter is focused on Defendants' mis-representation, as required commission of fraud

and malpractice to further their agenda, the actions of all others continuing that "avoidance" of reform-law application, beyond their respective authorities, appear to complete a "cover-up" for those same or different reasons , such that, a very serious circumstance has evolved for this Supreme Court's supervisory reaction, as a turning-point

3 Unauthorized Defacto Taxation by a State Entity

The University of California and, so, The Regents are a Constitutionally Chartered arm of California State government The bargaining for corporate governance measures (two Board of Directors' Seats control) by, in this case, a government entity is a dirty shortcut to government intrusion into private enterprise and wholly unwarranted creation of yet another quasi-government enterprise, albeit, this time by a State rather than federal government authority Were the taking of control by this means not of dubious legitimacy, the actual and complete terms of the settlement would more-likely have been published to the Class for consideration and not encrypted with proprietary technology The cost of that shift of control disproportionately effected a relatively small population of nationally distributed investors and non-residents of the State of California , and, further, the cost acts as an unauthorized levy of taxation There was no Federal Tax Payer basis for the grant of control, and, the desire for that California State control exists only in a greedy minority linked to the Dynegy Corporation as, thereby, a State of Texas

interest and precisely against the Class interest to maximum recovery of losses through the actions of honorable representation Plaintiff has previously reasoned that Board of Directors' seats have quantifiable value and must be bargained for by other means than at someone else's expense in a Class-Action Settlement That reasoning is here amplified to describe that non-residents of the interested States can not be subjected to any State agenda, including taxation, within a nationally-based, Federal Class-Action That reasoning remains fully-supported by the P S L R A "share and share alike" provisions cited to the case and incorporated within the required Lead-Plaintiff Sworn Certificate in recognition of the P S L R.A reformed-conduct of class representation

4. Vast Effect to "Generational Robbery" and Due Process

The matters exposed here in this case have considerable impact on an entire generation of individual investors and their retirement savings as had been mistreated first by corporations and again in resultant Class Actions and, so, required the 1995 Act of Congress to reform pertinent law As possibly this Court's first opportunity to evaluate the specific cites within P S L R A in order to interdict the conflicts-of-interest by Lead Plaintiffs with the actual interests of the Classes they represent, this Court's action is vital to consistent and determined law administration At issue in this regard is no less than the enforcement of reform law to protect the represented from abuses demonstrably visible to both Congress and the Executive The lower courts must necessarily

be held to timely adherence to the requirement to make Judicial Notice of Federal Law or deny by delay Due Process Civil Rights

Plaintiff presents his opinion, consistent with this Supreme Court's previous interpretations, that The Due Process Clause of The U S Constitution effectively defines that U S laws must be uniformly applied. Of that uniformity of law application and Due Process, both in the first instance by a court presiding over such Judgments and Settlements of Class Actions and later, as in this case, where a U S Court of Appeals has mandated a levy of costs of the defense without actually applying the pertinent law cited within Plaintiff's case, all sense of either justice or law is obliterated. Because the cited P S L R A provisions remain avoided by any overt Court Opinion to this case, the law remains un-applied and both Due Process and, thus, Plaintiff's Civil Rights have been denied.

5. Transference to a Federal Liability

It is not preferentially a responsibility of the U S Tax Payers, as effectively the obliged Defendants in a Civil Rights case for Federal Courts' failure to defend Plaintiff's Civil Rights to Due Process, especially when the clear intention of Congress in the P.S.L R.A "Sworn Certificate" provision (cited) attests to both a Class Action Lead Plaintiff knowledge of reform changes to the previous law AND hooks class-representatives and not Federal Courts or Tax Payers for damages caused by a

breach of class-representation Plaintiff has previously opined that it is a clear breach of the P.S.L.R.A provision to "share and share alike" when exclusive power and control and not the monetary damages beneficial to recompense the Class' monetary losses are bargained for by a Lead Plaintiff In that precise context it is an injustice to delay this Plaintiff's restoration forwarded to another Federal Suit and place the ultimate burden on Tax Payers not truly responsible for these Defendants' untoward greed to disproportionate benefits in the Dynegy Class Action Settlement

The effectiveness of Law Doctrine (here re-cited) endorsed by this Supreme Court, found in Table of Authorities at item 3, within

"It is a traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime",

as applied to the Texas Court of first instance, appears in serious conflict with this Supreme Court proceeding to conclusions favoring denial of the Petition for Writ of Certiorari by a simple virtue That virtue defines any lack of regard for what Petitioner maintains was these Defendants' breach of representation (and the laws and precedents specific to accountability for breach) as an actionable lack of supervision by all the courts given an opportunity in this case So called "Governance Changes" comprising a Lead-Plaintiff's intrusion onto a Board of Directors has been rationalized as effectively a before-the-fact-

type, court of equity enjoinder of future crimes of the settling corporation resolved through a lead-plaintiff presence on the Board of Directors Since such can not, by cite above, be the true rationale, such outside-doctrine rationale is a thinly-veiled excuse to promote power-grabs of unshared settlement considerations within class-actions. The present 5th Circuit initiative to discard Due Process and, so, effectively convert the liability to U S Tax Payers in deference to the scope of the scandal, molly-coddled the corruption and encourages it The duty of U S Courts is to the laws and not to safeguarding a privilege for elite groups to defy reform

What is Desired From The Supreme Court

This Court's Supervisory Power to see that equal justice is administered in upholding the F.R.E would seem to apply and necessitate Grant of Plaintiff's Petition for Certiorari The court should already understand the Plaintiff is not an attorney and that some leeway of expression and potential for court amendment of the Petition "as Justice so requires" applies and may be necessary

It is the desire of Petitioner that the Supreme Court reconsider the matter and grant the Writ in order that the court's well-considered opinions can be formally generated to precedent Among several reasons for such a conclusion is the need for interpretation and application of the cited provisions of reform-law within the P S L R A so that the ordeal of bringing similar matters to the

court's attention is not necessitated of a repetition at some other time by someone else

Having received no response from Defendants to the Petition for Writ of Certiorari or the issues of P.S L R.A violation at any time, it is my understanding from S.Ct Rule 44 that the temperature may be raised by a direct, court request for a response to this rehearing petition that a response to actual issues may finally be boiled out of them

Charles W. Birks 4/22/2010

Signature of Petitioner, *pro se* date

Charles W Birks
1586 Dry Ridge Rd
Walton, WV 25286
304-577-6610

APPENDIX

Appendix Table of Contents

A. Order of Denial by Supreme Court

Page 1

B List of Citations and Orders

Pages 3 - 4

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-001

William K Suter
Clerk of the Court
(202) 479-3011

March 29, 2010

Mr Charles W. Birks
1586 Dry Ridge Road
Walton, WV 25286

Re. Charles W. Birks
v Keith F Park, et al.
No 09-880

Dear Mr. Birks·

The Court today entered the following order in the above-entitled case The petition for a writ of certiorari is denied

Sincerely,

s / William K Suter
William K Suter, Clerk

Citation List of Opinions and Orders to the Case

1. 11/21/2007 - Standing Order In Re Assignment And Referral Of Civil Actions To Magistrate Judges

2. 5/07/2008 - Notice And Order

3. 5/08/2008 - Order Vacating That Notice And Order of 5/07/2008

4 7/08/2008 - Proposed Findings And Recommendations

5 7/25/2008 - Order Directing Reassignment Of The Civil Action To Another Judicial Officer Of The District

6 7/29/2008 - Clerk's Order Reassigning The Civil Action From Judge Copenhaver To Judge Goodwin

7 8/19/2008 - Memorandum And Order

8 9/02/2008 - Order Denying Plaintiff's Motion To Reconsider

9. 9/08/2008 - Order Of Pretrial Conference Of The Texas U S District Court

10. 9/08/2008 - Order To Disclose Interested Persons

11 9/10/2008 - Order Concerning Removal

12. 9/25/2008 - Memorandum and Order

13. 10/15/2008 - Order Granting Motion To Transfer Case To Judge Lake

14. 11/17/2008 - Order Denying Plaintiff's Motion To Stay Pending Appeal To The 4th Circuit Court

15 1/20/2009 - Judgment Of The 4th Circuit Court As DISMISSED Plaintiff's Appeal

16 1/20/2009 - Per Curiam Opinion Supporting Dismissal Of Plaintiff's Appeal

17. 2/12/2009 - Memorandum Opinion And Order Granting Defendants' Motion For Judgment

18 2/12/2009 - Final Judgment Dismissing Plaintiff's Texas Court Action With Prejudice

19. 3/03/2009 - Order Of The Clerk As Denied Plaintiff's Petition For Rehearing En Banc In The 4th Circuit Court

20. August 27, 2009 Per Curiam Opinion of the 5th Circuit Court as Affirmed the Texas District Court dismissal

21. September 30, 2009 Order of the 5th Circuit Court as Denied both Rehearing and Rehearing En Banc petitions

22 October 5, 2009 Order of the U S Supreme Court as Denied petition for writ of mandamus and/or prohibition (docket no. 08-1549)

23 March 29, 2010 Order of the Supreme Court of the U S as Denied Petition for Writ of Certiorari (docket no 09-880)

In The Supreme Court of The United States

CHARLES W BIRKS,
Petitioner, *pro se*,

v

KEITH F PARK, Esquire , COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP , REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents

Certificate of Rule Compliance and Non-Delay Motive

Under S Ct Rule 44, Petitioner certifies that the reasons for filing the foregoing Petition for Rehearing are unrelated to the effect of delay in the implementation of the mandate for levy of defense costs or for any other reason of delay The desire remains the same as it has been, that substantive justice in the matter of Federal Law violation by Defendants be actually addressed in the courts Every effort has been made to restrict the rehearing petition to the grounds specified which are understood to include exposition of unintended/unforseen consequence as substantial or controlling elements within intervening circumstances and not previously expounded

Charles W. Birks 4/22/2010

Signature of Petitioner, *pro se* date
Charles W Birks

plaintiff has requested will redress the injury. *Doe v. Tangiphoa Parish School Bd.*, 494 F.3d 494, 496 (5th Cir. 2007); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)), *cert. denied*, 127 S.Ct. 938 (2007). The injury "must be actual or imminent, and not abstract, conjectural, or hypothetical." *Federal Election Com'n v. Akins*, 524 U.S. 11, 20 (1998).

In addition, prudential restrictions include "a requirement that a litigant generally must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties." *Ward v. Santa Fe Independent School District*, 393 F.3d 599, 606 (5th Cir. 2004), *citing Warth v. Seldin*, 422 U.S. 490, 499 (1975) (rule against bringing *jus tertii* claims). The rationale for this rule was that (1) it "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in area where their constitutional application might be cloudy" and (2) it insures that the issue before the court will be concrete and sharply defined. *United States v. Raines*, 362 U.S. 17, 22 (1960); *Baker v. Carr*, 369 U.S. 186, 204 (1992).

In *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1975),[9] however,

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[9] In *Munson*, the plaintiff, a professional for-profit fund-raising organization, sought declaratory and injunctive relief in

(Continued on following page)

the United States Supreme Court held that "where competing considerations outweigh any prudential rationale against third-party standing," the rule is "relaxed." Specifically, it opined,

> Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First Amendment challenge could be brought by one engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected

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a suit against the Secretary of State of Maryland in a First Amendment challenge to a statute prohibiting charitable organizations from paying or agreeing to pay as expenses in a fund-raising activity more that 25% of the amount raised; thus the statute placed restrictions on a charity's protected First Amendment rights. Munson standardly charged charitable organizations more than the statutory cap for the events Munson promoted. Moreover, the Secretary threatened to prosecute Munson if it did not comply with the limitation. As a result, Munson's charity clients were reluctant to enter into contracts with Munson and its business was impaired. The Court determined that Munson had standing to challenge the statute because it suffered actual and threatened injury because of the statute. 467 U.S. at 954-55. Moreover, even though there was no showing that a charity could not bring its own suit, the Supreme Court applied the narrow exception to prudential concern embodied in the rule against *jus tertii* claims, where a statute allegedly chills free speech is challenged as overly broad under the First Amendment. The Court allowed Munson to go forward because of society's interest in having the statute challenged because it might chill the First Amendment rights of others. *Id.* at 957-58.

> activity. Society as a whole then would be the loser. Thus when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. "Litigants therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Id. at 956-57, *quoting Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).

Plaintiff has standing to sue on its own behalf and on the advertisers' behalf. It has shown that a real and substantial controversy exists between it and the City. As a billboard company erecting billboards containing both commercial and noncommercial or mixed messages[10] that are regulated by the ordinance, it has standing for a First Amendment facial challenge to the constitutionality of an ordinance regulating billboards on the basis of content. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 503-04 (1981). Plaintiff has also been cited for

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[10] Testimony at the hearing from the City's Sign Administrator, Susan Luycx, indicated that the determination whether a sign was commercial or noncommercial generally was not simple, required research, and, implicitly, a value judgment that could not be made merely from the face of the message.

violations of the ordinance approximately two hundred times in the last three years, and the City instituted a civil suit in July 2007 against it and threatens criminal prosecution. *Houston Chronicle Pub. Co. v. City of League City,* 488 F.3d 613, 618-19 (5th Cir. 2007) (Houston Chronicle has injury-in-fact standing for a First Amendment challenge, both facially and as applied, of an ordinance barring vendors at street intersections as unconstitutional after receiving citations for violating it and after city promised to enforce the ordinance against the newspaper), *citing Steffel v. Thompson,* 415 U.S. 452, 459 (1974) ("it is not necessary that [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"); *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves,* 601 F.2d 809, 818 (5th Cir. 1979) (a justiciable controversy exists when "the plaintiff is seriously interested in disobeying, and the defendant seriously intent on enforcing the challenged measure").

Moreover the relaxing of the prudential rule against third-party claims and the narrow First Amendment exception apply here. Geoff Roberts, CFO of RTM Media since 2002, testified that a lot of its advertising customers, which are generally small businesses, had called about the City's letter threatening to criminally fine them, and a few demanded to be released from their contracts with Plaintiff; the clients' withdrawal would in turn substantially damage Plaintiff's business. *Munson,* 467 U.S. at 954-55.

(Munson's clients' reluctance to enter into contracts with Munson after Munson was threatened with prosecution if it failed to comply with the statute was found to be a sufficient injury for standing).

Moreover, with respect to challenging the term "use" on behalf of its advertisers, the Court would point out that the City's Sign Administrator testified that permits are not required of advertisers. Furthermore a careful reading of the letter sent to Plaintiff's advertisers demonstrates that the City only threatens to fine those advertisers who place commercial messages on billboards not permitted by the City. Regardless, the narrow exception to the *jus tertii* rule applies here, given the threat of chilling their speech based on the City's epistolary threats to criminally fine its advertisers. The causation and redressability elements are obviously satisfied here also. The ordinance has caused the citations, civil law suit, and threat of criminal prosecution of Plaintiff and the threat of citations of the advertisers. Enjoining enforcement of the Sign Code would clearly redress that injury.

Third, the City contends that the Sign Code is constitutional because the City has reasonable justification for exempting noncommercial signs and because courts have upheld distinctions between commercial and noncommercial signs in other cities' sign codes as constitutional. *Lavey v. City of Two Rivers,* 171 F.3d 1110 (7th Cir. 1999); *Infinity Outdoor, Inc. v. City of New York,* 165 F. Supp. 2d 403 (E.D.N.Y. 2001). This argument goes to the merits of

the case, which are not before the Court today. Moreover these two cases do not address the precise issue for preliminary injunctive relief before this Court today.

Fourth, the City contends collateral estoppel precludes Plaintiff from relitigating the issue of whether it is required to obtain a permit from the City before erecting billboards in the highway corridor of ETJ. *Brooks v. State of Texas,* 226 S.W.3d 607, 610-11 (Tex. App. – Houston [14th Dist.] 2007) (holding that section 216.902 of the Texas Local Government Code authorizes a home-rule city, such as Houston, to regulate off-premises signs along primary highways in its ETJ, but is silent as to barring both State and home-rule city from concurrently regulating off-premises signs along interstates and primary highways in the City's ETJ.).[11] Plaintiff is not seeking injunctive relief based on this issue of State versus City regarding jurisdiction over the ETJ. Plaintiff's request is based on its facial challenge that the Sign Code discriminates based on content against billboards with commercial messages while permitting those with noncommercial messages and on the City's threats to fine the advertisers who post commercial messages on billboards not permitted by the City under the Sign Code, in violation the First Amendment.

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[11] Curtis Brooks is Plaintiff's director.

Standard of Review

An injunction is an extraordinary equitable remedy that may only be granted if the plaintiff demonstrates four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the court denies injunctive relief; (3) the threatened injury outweighs any damage that the injunction might cause to the nonmovant; and (4) the injunction will not disserve the public interest. *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998); *Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006).

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Supreme Court noted "the lesser protection accorded to commercial speech than to other constitutionally guaranteed expression" in its previous opinions. *Id.* at 562-63. Nevertheless it observed, "Commercial expression not only serves the economic interest of the speaker, but it also assist [sic] consumers and further societal interest in the fullest possible dissemination of information." *Id.* at 562. Thus the "First Amendment's concern for commercial speech is based on the informational function of its advertising" and therefore the government can suppress inaccurate, misleading, or deceptive communications and "commercial speech related to illegal activity."[12] *Id.* at

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[12] No one in the instant action has alleged that the advertisements on Plaintiff's billboards were related to illegal

(Continued on following page)

563-64. For other commercial speech, it "must assert a substantial interest to be achieved by restrictions on commercial speech" and its "regulatory technique must be in proportion to that interest," with any restrictions on expression "designed to achieve the State's goal." *Id.* at 564. Thus the Supreme Court established two criteria to ensure any restriction on commercial speech is constitutional: it must "directly advance the state interest involved" and it must be "narrowly drawn" to extend the restriction only as far as it serves that state interest. *Id.* at 564-65. The restriction does not have to be the least restrictive means available, but there must be a reasonable fit between the state or government's goals and the means chosen to accomplish those goals. *Board of Trustees of State University of New York v. Fox,* 429 U.S. 469, 480 (1989).

Based on the ruling in *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993), this Court concludes that Plaintiff has a substantial likelihood of success on the merits here. In that case, purportedly for purposes of safety and aesthetics, the City of Cincinnati banned newsracks on public property containing commercial publications while allowing newsracks with noncommercial publications and notified the commercial newsrack owners to remove their newsracks within thirty days. It argued

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activity or that they were false or misleading. Thus *Central Hudson*'s two-prong test applies here.

that the regulation would result in many fewer newsracks, thereby increasing safety and attractiveness in the city. Discovery Network, which advertised its adult educational, recreation and social programs in a free magazine that was distributed on newsracks in Cincinnati, sued the city. Rejecting Cincinnati's assertion that "the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills,'" the Supreme Court found that because the regulation eliminating some newsracks was based on the difference in content between ordinary newspapers and commercial speech, it was unconstitutional; it was not content neutral nor a valid time, place, or manner restriction on speech. The distribution of noncommercial publications was just as likely to result in littering as the distribution of commercial publications. *Id.* at 428-29. Both types of newsracks were equally unattractive. The Supreme Court opined, "Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case the distinction bears no relationship *whatsoever* to the particular interests the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests." *Id.* at 424.

This Court sympathizes with the City's substantial interest in reducing and preventing "billboard blight" for reasons of aesthetics, traffic safety, and property values, but the City cannot achieve

those goals by regulating billboards based on the content of their message. Noncommercial billboards are visual blights, traffic dangers, and undesirable for property values for the same reason as commercial billboards. The City can impose content neutral restrictions on time, place, and manner without reference to the content of the regulated speech and that are directly related to their goals, e.g., restricting the overall number of billboards it permits, their location, size, etc., but not by regulating and prohibiting only off-premises commercial billboards while allowing noncommercial billboards to proliferate freely. Moreover, threatening to fine or fining commercial advertisers, who have no control over a sign and cannot take it down, does not meet the requirement that restrictions on speech must be directly related to the City's goals but clearly infringes on their right of freedom of speech. The City's justification that such pressure tactics against advertisers are acceptable because they "work" does not cure the constitutional problem here.

It is well established that a violation of a party's constitutional rights constitutes irreparable harm as a matter of law. *See, e.g., Elrod v. Burns,* 427 U.S. 347, 373-74 (1976); *Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981). A denial of First Amendment freedoms, even for a short period of time, constitutes irreparable injury. *New York Times Co. v. United States,* 403 U.S. 713 (1971).

The threatened injury to Plaintiff and to the advertisers outweighs any damage the injunction

could cause the City. Plaintiffs and others will be denied their First Amendment freedoms if the ordinance is enforced, while the City has alternative, constitutional ways of regulating signs in a content-neutral manner to achieve its goals of protecting the City's aesthetics, traffic safety, and property values.

It is clearly in the public interest to enjoin an ordinance that restricts the public's constitutional right to freedom of speech.

Accordingly, the Court

ORDERS that Plaintiff's motion for preliminary injunction is GRANTED. It is therefore

ORDERED that the City shall be enjoined from enforcing its Sign Code, codified at Chapter 46 of the City of Houston Building Code, because there is a substantial likelihood that its content-based distinction between commercial and noncommercial speech violates the Free Speech Clause of the First Amendment and (2) from fining or threatening to fine advertisers placing advertisements on billboards in the ETJ not permitted by the City. Pursuant to Fed. R. Civ. P. 65(c) Plaintiff shall file with the Clerk of the Court a bond in the amount of $25,000.00 as security.

The Court further

ORDERS that the following docket control schedule is now in effect:

1. **MOTIONS FOR LEAVE TO AMEND PLEADINGS AND JOIN NEW PARTIES** will be filed by: October 17, 2007

   Party requesting joinder will furnish copy of this Scheduling Order to new parties.

2. **EXPERT WITNESSES** for the **plaintiff** will be named and a report of the experts's [sic] opinion furnished by: November 3, 2007

3. **EXPERT WITNESSES** for the **defendant** will be named and a report of the expert's opinion furnished by: November 14, 2007

4. **DISCOVERY** must be completed by: December 19, 2007

   Counsel may, by agreement, continue discovery beyond the deadline, but no continuance will be granted because of information acquired in post-deadline discovery.

5. **DISPOSITIVE MOTIONS** will be filed and served by: January 18, 2008

6. **NON-DISPOSITIVE MOTIONS** will be filed by: January 18, 2008

7. **JOINT PRETRIAL ORDER** will be filed by: March 17, 2008
   Plaintiff is responsible for filing the Pretrial Order on time.

8. ***DOCKET CALL*** is set for 1:30 P.M. March 28, 2008

9. ***TRIAL*** is set for the two weeks starting: March 31, 2008.

SIGNED at Houston, Texas, this 26th day of September, 2007.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20701

RTM MEDIA, LLC,

Plaintiff-Appellant,

versus

CITY OF HOUSTON,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Oct. 26, 2009)

Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT

/s/ Jerry Smith
United States Circuit Judge